

No. 12398

United States
Court of Appeals
For the Ninth Circuit.

COVEY GAS AND OIL COMPANY,
a corporation,

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECK-
ETTS, husband and wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Eastern Division.

FILED

APR 4 1950

PHILLIPS & VAN ORDEN

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	5
Exhibit A—Copy of Order of Dismissal..	9
Appearances	1
Certificate of Clerk.....	161
Complaint	2
Designation of Record on Appeal.....	156
Instructions to the Jury.....	137
Judgment	18
Minutes of the Court of May 20, 1949, Ruling on Plaintiffs' Motion to Strike.....	12
Minutes of the Court of June 1, 1949, Ruling on Defendant's Motion to Bring in Additional Party Defendants.....	13
Minutes of the Court of June 2, 1949.....	14
Minutes of the Court of June 3, 1949.....	17
Motion to Bring in Ralph L. Bowman as Party Defendant	12
Motion for New Trial.....	19

	INDEX	PAGE
Motion to Strike.....		11
Notice of Appeal.....		25
Objections to Instructions.....		148
Order Denying Motion for New Trial.....		22
Order Extending Time for Filing Appeal in Circuit Court.....		25
Statement of Points.....		158
Transcript of Record.....		26
Witnesses, Defendant's:		
Bowman, Ralph L.		
—direct		121
—cross		127
—redirect		136
—recross		136
Goodson, Fred W.		
—direct		117
—cross		119
—redirect		120
—recross		121
Smith, Robert R.		
—direct		104
—cross		112
—redirect		114
—recross		115

INDEX

PAGE

Witnesses, Plaintiffs':

Bischoff, Mr.

—direct	51
—cross	56
—redirect	64
—recross	65

Bischoff, Mrs. Margaret

—direct	65
—cross	66

Bowman, Ralph L.

—direct	27, 90
---------------	--------

Carter, Myron Davis

—direct	28
—cross	34
—redirect	38

Checketts, Norell

—direct	96
---------------	----

Checketts, Mrs. Twila

—direct	101
---------------	-----

Eames, Waldo

—direct	38
—cross	43
—redirect	49

Hardman, Mrs. Lavern

—direct	79
---------------	----

Witnesses, Plaintiffs'—(Continued):

Howe, Reed	
—direct	67
—cross	74
—redirect	79
Marley, Alma	
—direct	85
—cross	87
Pugmire, R. M.	
—direct	89, 91
—cross	94
Reynold, R. J.	
—direct	81
—cross	85

APPEARANCES

For Plaintiffs:

BEN W. DAVIS, ESQ.,

Pocatello, Idaho.

LOUIS F. RACINE, ESQ.,

Pocatello, Idaho.

For Defendant:

O. R. BAUM, ESQ.,

Pocatello, Idaho.

BEN PETERSON, ESQ.,

Pocatello, Idaho.

In the District Court of the United States in and
for the District of Idaho, Eastern Division

1524

NORELL T. CHECKETTS and TWILA CHECK-
ETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY of Idaho, a
corporation,

Defendant.

COMPLAINT

Plaintiffs complain of the defendant and allege
as follows:

I.

That the plaintiffs and each of them are residents
of the State of Utah and the defendant is a corpo-
ration of the State of Idaho. That the matter in
controversy exceeds, exclusive of all interest and
costs, insofar as each of the plaintiffs herein, are
concerned, the sum of \$3,000.00.

II.

That Norell T. Checketts and Twilla Checketts,
at all times herein mentioned have been and now
are husband and wife and were the father and
mother respectively of a child, Gary Checketts, now
deceased.

III.

That the defendant, Covey Gas and Oil Company

of Idaho, a corporation, during all times herein mentioned, was and now is, a corporation organized and existing under and by virtue of the laws of Idaho.

IV.

That at all times herein mentioned, the defendant was the owner of an oil tanker used by it in and about the operation of its business; said tanker at the time herein mentioned, bearing Idaho License No. 1B-806.

V.

That at all times herein mentioned, Ralph L. Bowman was an employee of the defendant, acting upon the business of said employer and within the scope of his employment.

That on the 24th day of February, 1947, the defendant, by and through its agent and employee, so negligently and carelessly operated said oil tanker upon what is known as U. S. Highway 30-91 in Bannock County, Idaho at a point approximately four miles in a southerly direction from the City of Pocatello, Idaho, that it drove and caused to be driven said oil tanker against the body of the said Gary Checketts who was crossing said highway from a school bus.

VI.

That as a result, the said Gary Checketts was mangled, bruised and killed; that the actions of the defendant in the operation of said oil tanker was wanton, wilful, reckless and in complete disregard of the rights of Gary Checketts and these plaintiffs.

VII.

That the said Gary Checketts was a bright, healthy, strong, industrious and intelligent boy; that he was very affectionate and devoted to his parents and his society and his companionship afforded and had he lived, would have continued to afford to his parents, great and valuable comfort and companionship and out of the affection and duty which he bore to them, he would, had he lived, contributed in the aggregate, large sums of money to the support of his said parents, the plaintiffs herein, and he would, had he lived, performed services and earnings of great value to his parents prior to his majority. That the plaintiffs herein are and were at all times herein mentioned, people of meager means, whose state and condition in life is such that during their declining years, they would have required and invoked and received from their said son, substantial contributions to their maintenance and support, extending over a long period of years and during said time would have received great comfort and companionship in the society of their said son. That the plaintiffs herein have incurred in medical and hospital expense, the sum of \$407.50; that they have been damaged in the sum of \$75,000.00 general damages and have been damaged in and are entitled to punitive damages in the sum of \$25,000.00.

Wherefore, Plaintiffs demand judgment against

the defendant in the sum of \$100,407.50 and for all costs, and plaintiffs pray for general relief.

/s/ B. W. DAVIS,

/s/ L. F. RACINE, JR.,

Attorneys for Plaintiffs.

Plaintiffs herein request and demand a trial by jury.

[Endorsed]: Filed January 26, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and as and for its answer to the complaint of the plaintiff herein alleges, denies and affirms as follows:

First Defense

I.

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant denies each and every allegation in said complaint contained, save and except those particular allegations hereinafter specifically admitted.

II.

Admits the allegations of paragraphs I, II and III.

III.

Defendant admits that it was the owner of an automobile truck bearing license No. 1B-806, but denies that the said truck was what is commonly called an "oil tanker."

IV.

Answering paragraph V defendant admits that Ralph L. Bowman was an employee of the defendant on the 24th day of February, 1947, but denies each and every other allegation in said paragraph V.

Third Defense
(Affirmative Defense)

Further answering said complaint, and as a third defense thereto, your said defendant alleges:

I.

That at the time and place mentioned in said complaint the said Gary Checketts did not exercise due care, caution or prudence in the premises to avoid said accident and the resulting injuries, and that the injuries and the death of the said Gary Checketts was directly and proximately contributed to, and caused by, the fault, carelessness and negligence of the said Gary Checketts.

Fourth Defense
(Affirmative Defense)

Further answering said complaint, and as a fourth defense thereto, your said defendant alleges:

I.

That at the time and place mentioned in said complaint the person in charge of the said school bus owned and operated by Independent School District No. 1, Class A, Bannock County, State of Idaho, namely Robert R. Smith, did not exercise ordinary care, caution and prudence in the premises to avoid the accident, and more particularly the accident herein in question and the resulting injuries that arose out of the said accident, and that the death of the said Gary Checketts was directly and proximately contributed to and caused by the fault, carelessness and negligence of the said person operating said bus owned by the said Independent School District No. 1, Class A, Bannock County, Idaho, and that at the time and place mentioned in said complaint the person operating the said school bus owned by Independent School District No. 1, Class A, Bannock County, Idaho, namely Robert R. Smith, was acting in the line, course and scope of his employment as the driver of said school bus for and on behalf of the said Independent School District No. 1, Class A, Bannock County, Idaho.

Fifth Defense

(Affirmative Defense)

Further answering said complaint, and as a fifth defense thereto, your said defendant alleges:

I.

That at all times mentioned in said complaint Ralph L. Bowman was operating said truck in a

careful and prudent manner and at all times mentioned in said complaint the said Ralph L. Bowman kept and maintained a look out upon said highway, and at all times took every reasonable precaution to avoid the collision referred to in said complaint and at all times mentioned in said complaint had reasonable control over the motor vehicle driven by him.

Defendant further alleges that at no time did Ralph L. Bowman pass the school bus referred to in said complaint negligently or otherwise.

Sixth Defense

Further answering said complaint, and as a sixth defense thereto, your said defendant alleges:

I.

That heretofore the said plaintiffs herein instituted an action in the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, entitled Checketts vs. Covey Gas and Oil Company, a corporation, and Ralph L. Bowman, and thereafter the said plaintiffs herein procured an order of dismissal in said matter as to the defendant in this action, leaving said action pending against the said Ralph L. Bowman, he being the identical person referred to in the pleading in this case as the agent of the defendant herein; that a copy of said Order of Dismissal is hereto attached, marked "Exhibit A" and made a part of this Answer as if copied herein at length, and that said action in the

Fifth Judicial District of the State of Idaho, in and for the County of Bannock, is now pending.

Wherefore, Your defendant, having fully answered, prays that the plaintiffs take nothing by reason of their said complaint and, the defendant herein, having tendered a third party complaint herein, prays for the relief as asked for in said third party complaint, and for all proper relief.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

“EXHIBIT A”

In the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY of Idaho, a corporation and RALPH L. BOWMAN,

Defendants.

ORDER OF DISMISSAL

Upon Motion of Attorneys for Plaintiffs, it appearing to the Court that a counter claim has not been made or affirmative relief sought by a cross-complaint or answer of the defendants or either

Exhibit A—(Continued)

of them, and that plaintiffs have a legal right to dismiss their case or cause of action as to Covey Gas and Oil Company of Idaho, a corporation, one of the defendants and to retain their right to prosecute and continue with their action against Ralph L. Bowman, defendant and the Court being fully advised in the premises;

It Is Ordered that the Amended Complaint of the plaintiffs herein and the plaintiffs' case or cause of action as to Covey Gas and Oil Company of Idaho, a corporation, defendant, is, upon plaintiffs' Motion hereby dismissed at plaintiffs' costs and without prejudice to plaintiffs in the bringing of another action, and

It Is Ordered that said dismissal is not a dismissal of plaintiffs' case or cause of action against Ralph L. Bowman, defendant.

Dated this 26th day of January, 1949.

L. E. GLENNON,
District Judge.

Filed Jan. 26, 1949, 3:25 p.m.

ANNA KEEFE,
Clerk, Auditor and Recorder, Bannock County,
Idaho.

[Endorsed]: Filed April 4, 1949, U.S.D.C.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the plaintiffs by and through their attorneys, B. W. Davis and L. F. Racine, Jr., and move to strike certain portions of defendant's defense upon the following grounds and for the following reasons, to-wit:

I.

Plaintiffs move to strike the fourth affirmative defense of the defendant as found on pages 2 and 3 of defendant's answer for the reason that the same contains only redundant and immaterial matter and that said defense is confusing and that any evidence that would be competent on behalf of the defendant in support of such defense would be competent under the general allegations of the defendant's first, second, third and fifth defenses.

II.

Plaintiffs move to strike what is termed the Sixth defense of the defendant as found on Pages 3 and 4 of defendant's answer, for the reason that said Sixth defense is redundant, immaterial and does not in any way plead or set up any defense to the plaintiffs' action, plaintiffs having a right to proceed against the defendant in this cause irrespective of any action that may be pending against Ralph L. Bowman. That said defense can only tend to confuse the issues and evidence in support of the

same could not be introduced in the trial of this cause.

Respectfully submitted:

/s/ B. W. DAVIS,

/s/ L. F. RACINE, JR.,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF MAY 20, 1949
RULING ON PLAINTIFFS' MOTION TO
STRIKE

This cause came on regularly in open court on plaintiffs' Motion to Strike, B. W. Davis representing plaintiffs and O. R. Baum and Ben Peterson representing the defendant.

After hearing respective counsel, the Motion as it pertains to the fourth affirmative defense was overruled without prejudice, and granted as it pertains to the sixth defense.

[Title of District Court and Cause.]

MOTION

Comes now the defendant above named and moves the Court for an order bringing in to the above entitled case Ralph L. Bowman, operator driver of

the truck referred to in plaintiffs' complaint, upon the ground and for the reason that complete relief cannot be accorded between the person already parties to said cause unless said Ralph L. Bowman is made a party hereto.

This motion is based upon the records and files of the above entitled action and is predicated upon the provisions of Rule 19, Subsection B of the Federal Rules of Civil Procedure.

Dated this 1st day of June, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 1, 1949
RULING ON DEFENDANT'S MOTION TO
BRING IN ADDITIONAL PARTY DE-
FENDANTS

This cause came on regularly in open court for hearing on defendant's Motion to Bring in Additional Party Defendants. After hearing respective counsel, the Court announced that the Motion was denied.

Whereupon the case came on for trial before the Court and a jury, B. W. Davis and L. F. Racine appearing as counsel for plaintiffs and O. R. Baum and Ben Peterson appearing as counsel for defendant.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. H. B. Markham, W. Grant Kimball and James L. Craig, whose names were so drawn, were excused for cause; Jerry E. Johnson and Bernice Berry, whose names were also drawn, were excused on plaintiffs' peremptory challenge; and Mrs. W. H. Coke, whose name was likewise drawn, was excused on defendant's peremptory challenge.

The Court admonished the jury and recessed until 10 o'clock A.M., Thursday, June 2, 1949.

The following jurors were in the box at time of recess:

Ray J. Eskelson	Mrs. Val Goodman
Mrs. Theodora Poole	Mrs. Clara Jones
Wilfred Glead	Theodore Meierotto
Mrs. Edna Robins	E. A. Crockett
Bryan J. Larsen	Ethel T. Parker
Ed. Morgan	Murl McNabb

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 2, 1949

The trial of this cause was resumed before the Court and jury, counsel for respective parties being present.

Following are the names of the persons whose

names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

Ray J. Eskelson	Mrs. Val Goodman
Mrs. Theodora Poole	Mrs. Clara Jones
Wilfred Glead	Theodore Meierotto
Mrs. Edna Robins	E. A. Crockett
Bryan J. Larsen	Ethel T. Parker
Ed Morgan	Murl McNabb

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of Vernon Balls and Donald R. Foote were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of cause by counsel, Ralph L. Bowman, Davis Carter, Walter Eims, Mr. Bishoff, Margrett Bishoff, Reed Howe, Mrs. LaVerne Hardman, R. J. Reynolds, Alma Marley, R. M. Pugmire, Norell T. Checketts and Twila Checketts were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff.

It was stipulated in open court by respective counsel that Garey Checketts died as a result of the accident in question.

On motion of counsel for plaintiffs, the Com-

plaint was ordered amended by striking "\$950.00" in the third line of page three of the Complaint and inserting "\$407.50" in lieu thereof, and by striking "\$100,950.00" in the prayer of the Complaint and inserting "\$100,407.50."

Here plaintiffs rest.

Robert R. Smith, Fred W. Goodsen and Talph L. Bowman were sworn and examined as witnesses on the part of the defendant, and here defendant rests, and both sides close.

After admonishing the jury, the Court excused them to 10 o'clock a.m. on Friday, June 3, 1949.

In the District Court of the United States, for the
District of Idaho, Eastern Division
No. 1524

NORELL T. CHECKETTS and TWILA CHECK-
ETTS, husband and wife,
Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a corpora-
tion,
Defendant.

VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of \$35407.50.

/s/ BRYANT J. LARSEN,
Foreman.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JUNE 3, 1949

The trial of this cause was resumed before the Court and Jury, counsel for the respective parties being present, it was agreed that the jury panel and alternate jurors were all present.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the alternate jurors, and the jury panel retired in charge of bailiffs, duly sworn, to consider of their verdict.

Upon stipulation of counsel that each party would pay one-half the cost of lunch, the Court ordered the Marshal to them with lunch.

On the same day the jury returned into court, counsel for respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of District Court and Cause.]

“We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess damages against the defendant in the sum of \$35,407.50.

Bryant J. Larsen, Foreman.”

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

In the District Court of the United States, for the
District of Idaho, Eastern Division

No. 1524

NORELL T. CHECKETTS and TWILA CHECK-
ETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a corpora-
tion,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on June 1, 1949, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of \$35,407.50.

It is hereby ordered, adjudged and decreed that plaintiffs recover of defendant the sum of \$35,407.50, with interest, and their costs of action.

Dated at Pocatello, Idaho, this 3rd day of June, 1949.

/s/ ED. M. BRYAN,
Clerk.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant above named and moves the Court for an order granting it a new trial for the following reasons, and on the following grounds:

I.

That the Court erred in his instructions to the jury in the following particulars, to-wit:

(a) That the defendant requested that the Court instruct the jury in the above cause that in arriving at the damages to which the plaintiffs were entitled they had no right to take into consideration the mental suffering and the mental grief of the plaintiffs by reason of the death of Gary Checketts, and that the Court refused to give said instruction as requested by defendant, or any other instruction on the subject; that such request for instruction was in writing and filed with the Court prior to the Court's instructing the jury.

(b) That the Court instructed the jury, among other things, that in the event they found for the plaintiffs they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, but that said instruction was not limited as to what items of damages they could not take into consideration, and by said instruction implied that they could take into consideration in arriving at their verdict mental suffering and mental grief.

II.

That the Court erred in giving the instruction to the jury as to the measure of damages in this:

(a) That the Court stated to the jury that in the event they found in favor of the plaintiffs that among the things they could consider were damages by reason of loss of companionship, society and comfort, and that such instruction implied that they could allow damages for the mental suffering and mental grief, and that said instruction contained no limitations as to what items of damages could not be considered by the jury.

III.

That the verdict returned by the jury in said cause was excessive in this:

That the amount of the verdict is not supported by the evidence and that the amount of the verdict is an amount not authorized or allowed by the measure of damages provided for by statute in such cases.

IV.

That the verdict rendered by the jury in the above cause was the result of mistake, passion, prejudice or improper motive, which is substantiated by the fact that the verdict returned by the jury is in excess of the amount of such judgment as provided for by law.

V.

That the verdict returned by the jury was also excessive and that bias and prejudice entered into the verdict as a matter of law.

VI.

That the verdict was excessive and the facts and circumstances and evidence were such as to incite bias and prejudice of the jury and that as a result thereof the verdict was unreasonably augmented.

VII.

The Court erred in giving the following instruction:

“You are instructed as a matter of law that Gary Checketts having no control or authority whatever as to the operation of the school bus, and not having participated in any way in the driving or the operation of the same, that any negligence on the part of the driver or operator of the school bus, if you find there was any negligence on his part, could not be imputed to the said Gary Checketts and he would not be guilty of contributory negligence by reason of any act of the operator of the school bus,” for the reason that under the circumstances of the case the negligence of the school bus operator was imputable to the said Garry Checketts, and that the matter of imputed negligence was thus taken from the jury by such instruction.

Dated this 13th day of June, 1949.

/s/ O. R. BAUM,

BEN PETERSON,

Attorneys for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 13, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

There are two grounds urged in support of this motion for new trial:

First, that the Court failed to specially point out to the jury that it should not allow any damages for mental grief and anguish.

Second, that the verdict was excessive.

As to the first ground: At the time of the impanelling of the jury counsel were permitted to examine the jurors on matters not covered by the general examination of the Court, and at that time counsel for the defendant repeatedly explained to the jurors that damages for mental anguish and mental suffering could not be allowed in the event their verdict was in favor of the plaintiffs, and the jurors in reply to counsel's questions concerning this matter said they would not allow any damages for mental anguish and mental suffering. There was no objection by counsel for the plaintiffs to this line of questioning. Counsel for the plaintiffs, in his examination of the jurors agreed that the statement made by counsel for the defendant, to the effect that no damages could be allowed for mental grief and mental anguish, was correct. There being no dispute as to this matter the Court did not interfere.

At the completion of the evidence and prior to the submission of the case to the jury the Court called counsel into Chambers and went over all of

the instructions that were to be given, including the instruction as to the measure of damages. Counsel in their argument to the jury reminded the jurors of their answers to the questions propounded on voir dire examination and advised the jury of the instruction it was about to receive, and the Court permitted this argument.

Without passing upon the question as to whether an instruction on this or other matters that should be excluded from their consideration should have been given, there can be no question but what the jury was fully advised that it must determine the damages to be allowed the plaintiffs as contained in the instruction given by the Court,—in the event its verdict was in favor of the plaintiffs.

The instruction as given does not include mental suffering as an element of damage and there is no suggestion on the part of counsel that the instruction as given does not include all of the elements of damage upon which an award may properly be allowed. The Court could have gone farther and entered into the field of all matters that should be excluded and which were not proper for their consideration. In such an instruction, however, a great many things could possibly have been overlooked.

In view of the fact that the jury was so fully advised that mental suffering and mental anguish would not be included in the instructions and what elements would be included, the Court is satisfied that the jury considered only those matters which were embraced in the instructions.

As to the second ground,—that the verdict was excessive. The general rule is: “The Court will not interfere in such cases unless it appears that the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice.” There is no such showing here, and the Court, whatever his judgment personally might be, would not be justified in saying that the jury was wrong and attempt to correct the jury’s verdict by substituting the judgment of the Court.

Motion for new trial will be denied and it is so ordered.

/s/ CHASE A. CLARK,
U. S. District Judge.

Dated August 18, 1949.

[Endorsed]: Filed Aug. 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Covey Gas and Oil Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 3rd day of June, 1949, and from the order entered in this action on the 18th day of August, 1949, denying the new trial, and from any judgment entered by reason of such order.

Dated this 2nd day of September, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant.

[Endorsed]: Filed September 6, 1949.

ORDER EXTENDING TIME FOR FILING
APPEAL IN CIRCUIT COURT

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to December 5, 1949.

Dated this 30th day of September, 1949.

/s/ CHASE A. CLARK,

U. S. District Judge.

[Endorsed]: Filed September 30, 1949.

In The United States District Court,
District of Idaho, Eastern Division.

NORELL T. CHECKETTS and TWILA CHECK-
ETTS, husband and wife,

Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY OF IDAHO,
a corporation,

Defendant.

TRANSCRIPT

This matter was tried before the Honorable Chase
A. Clark, sitting with a jury, at Pocatello, Idaho on
June 1, 1949

APPEARANCES

BEN W. DAVIS, ESQ.,
Pocatello, Idaho

LOUIS F. RACINE, ESQ.,
Pocatello, Idaho
Attorneys for the Plaintiffs,

O. R. BAUM, ESQ.,
Pocatello, Idaho

BEN PETERSON ESQ.,
Pocatello, Idaho
Attorneys for the Defendants.

June 1, 1949 1:30 p.m.

The Court: This case is at issue now and set for
trial, the granting of this motion would mean the

vacating of the setting and putting it over for the term. I think the rule is well settled in Idaho that you can proceed against one or more of the tort feaṣors. I might be inclined to bring him in were it not for the fact that this motion is filed so late. There has to be a time when motions stop.

If this was on either of two grounds, jurisdiction or that the complaint didn't state a claim I would be inclined to grant the motion. The record may show that the motion is denied.

(Selection of Jury.)

June 2, 10 a.m.

(Opening statement by Mr. Davis.)

RALPH L. BOWMAN

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis

Q. State your name?

A. Ralph L. Bowman.

Q. Mr. Bowman, by whom were you employed on the 24th of February 1947?

A. Covey Gas and Oil Company. [3*]

Q. By whom are you employed now?

A. Myself.

Q. At that time what were your duties with the Covey Gas and Oil Company?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Ralph L. Bowman.)

A. I was assistant Manager of the Station at that time.

Q. On the day of the unfortunate occurrence to this boy the occurrence of the boy's losing his life, where had you been? A. McCammon.

Q. Who were you working for?

A. Covey Gas and Oil Company?

Q. As you came back who were you working for? A. Covey Gas and Oil Company.

Q. You had made such trips before?

A. Yes sir.

Q. That was within the scope and line of your duty? A. Yes sir.

Mr. Davis: That is all Mr. Bowman.

Mr. Peterson: No questions.

MYRON DAVIS CARTER

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis

Q. Will you state your name? [4]

A. Myron Davis Carter.

Q. I referred to you as Dick?

A. That is a nick-name I have had for a long time.

Q. Where do you live?

A. Thatcher, Idaho.

(Testimony of Myron Davis Carter.)

Q. How long have you lived there?

A. About six years.

Q. What is your occupation?

A. Farmer.

Q. Where were you on the 24th of February 1947 about four-thirty in that afternoon?

A. About four miles south of Pocatello.

Q. Where had you been?

A. American Falls to an auction.

Q. Who had you been with?

A. Mr. Eames.

Q. He was with you? A. Yes sir.

Q. What kind of conveyance were you in?

A. Automobile.

Q. Who was driving that automobile?

A. Mr. Eames.

Q. Where were you going?

A. South, for home.

Q. Did you notice a school bus. [5]

A. Yes sir.

Q. What was the condition of the road Mr. Carter?
A. They were good.

Q. Dry or wet? A. Dry roads.

Q. What was the condition of the weather that afternoon?
A. It was a nice afternoon.

Q. Clear? A. Yes sir.

Q. When did you notice the school bus?

A. We followed it for a mile or a mile and a half.

(Testimony of Myron Davis Carter.)

Q. What did it do from time to time?

A. Stopped to let children off.

Q. You know where Merridel Park is?

A. Yes sir.

Q. The scene of this accident? A. Yes sir.

Q. What happened at this place?

A. The bus stopped to let children off; the cars that were behind it stopped.

Q. How many cars?

A. As I recall one ahead of us and some cars behind us.

Q. Did all the cars proceeding in the direction you were going stop? A. Yes sir. [6]

Q. No cars back of the bus passed around?

A. No sir.

Q. Was there any conveyance or truck that came from the other direction? A. Yes sir.

Q. When did you first see that truck, how far away was it?

A. I could see the truck coming in front of the school bus about three blocks.

Q. How far was the road clear and straight to the south from where the bus stopped?

A. Three quarters of a mile.

Q. Approximately at what rate of speed was the truck you saw travelling?

A. Forty or fifty miles an hour.

Q. Did that truck stop? A. No sir.

Q. Did you see the school children getting off the bus? A. Yes sir.

(Testimony of Myron Davis Carter.)

Q. What did the children do after they got off the bus?

A. They started around back of the bus.

Q. The school bus was headed south?

A. Yes sir.

Q. Where did it stop with reference to its lane, —in reference to the lane of traffic?

A. In its lane, maybe a little to the right. [7]

Q. To the right? A. Yes sir.

Q. Were the children getting off that bus before you saw the truck coming? A. Yes sir.

Q. They were walking down the side of the bus?

A. Yes sir.

Q. Did that truck in any way slacken its pace?

Mr. Peterson: Objected to as leading.

The Court: It is somewhat leading.

Mr. Davis: Withdraw it.

Q. What happened?

A. The little boy I saw in the lead, in a hurry to get home, he ran around back of the bus, the truck came and I saw the little boy get hit before,—well he was out in the road and he got hit with truck, the truck picked him up and packed him quite a ways before it stopped.

Q. Which side of the truck struck the boy?

A. The right.

Q. As it was going north? A. Yes sir.

Q. Which side of the truck struck the boy,—what part?

(Testimony of Myron Davis Carter.)

A. Between the lamp and the fender. [8]

Q. Did you notice any dent or damage?

A. The lamp was bent.

Q. Did you know or do you know how far the truck went before it stopped after hitting the boy?

A. I would say about thirty-five steps.

Q. About thirty-five steps? A. Yes sir.

Q. At the time the truck struck the boy what was its rate of speed as compared to the time you first saw it? A. About the same as when I saw it.

Q. It had gone north of the bus and hit the boy as he crossed the road? A. Yes sir.

Mr. Peterson: Objected to as suggestive and leading.

The Court: The question was answered.

Q. Did you observe any lights or anything on this school bus, Mr. Carter?

A. Yes sir, blinker lights were on and off.

Q. What do you mean by on and off?

A. They would come on and go off.

Q. Did you hear anything with reference to any brakes? A. Not until after it hit the child.

Q. Then what did you hear?

A. I heard brakes.

Q. What were they doing? [9]

A. They were squealing, you know how brakes do.

Q. What kind of truck was this?

A. Gasoline truck I would call it,—a Federal truck, a red truck.

(Testimony of Myron Davis Carter.)

Q. With reference to the cab on it, would it be higher or lower than the front side of a touring car?

A. It would be higher.

Q. How long did you stay there Mr. Carter?

A. Until the school bus driver gave us permission to go.

Q. Before you left did you get that permission?

A. Yes sir.

Q. Did anyone come there while you were there?

A. Patrolman came and picked the boy up and took him to the hospital.

Q. Did you see any officer there making measurements? A. Not that I recall.

Q. You had gone at that time?

A. Yes sir.

Q. Mr. Carter, what color was this school bus?

A. Orange with black lettering.

Q. What sign or signs were on the back of it?

A. Stop and Independent School District I think was on it.

Q. How far in your judgment after the truck struck the boy—what happened to the boy?

Mr. Peterson: That has been asked and answered.

The Court: He may answer. [10]

A. The boy glued to the front of the truck until the truck slowed down and let him roll off.

Q. How far did he roll, in your opinion?

A. I would say about thirty-five or forty feet.

(Testimony of Myron Davis Carter.)

Q. Do you know of your own knowledge that the boy was dead when they took him away?

A. I didn't get right to the boy but I imagine he was dead.

Mr. Davis: That is all.

Cross-Examination

By Mr. Peterson

Q. Do you remember now the approximate width of the oiled portion of the highway?

A. Approximately twenty feet.

Q. Do you have in mind the approximate width of the shoulder on the west?

A. About four or five feet.

Q. West of the oiled surface? A. Yes sir.

Q. Are you reasonably sure of those measurements?

A. That is my guess.

Q. What is the width and condition of the roadway on the east from where the accident happened?

A. On the east there is a sort of driveway, I imagine fifteen or twenty feet of shoulder there.

Q. A driveway on the east? [11]

A. Yes sir.

Q. Is that an open driveway? A. Yes sir.

Q. Did you at the time you stopped behind the school bus see any arms sticking out from the bus?

A. I don't recall.

Q. You didn't see any, is that right?

A. That's right.

(Testimony of Myron Davis Carter.)

Q. How close were you parked behind the bus?

A. The second car, well out to the right.

Q. Approximately how many feet between your car and the back end of the school bus?

A. Twenty feet.

Q. Would you say there were no arms sticking out from the school bus?

A. No, I wouldn't say that.

Q. You didn't see any?

A. No sir, I didn't see any.

Q. Which side of the car in which you were riding were you sitting?

A. On the right.

Q. Who was driving? A. Mr. Eames.

Q. Did you see any arms sticking out the right side of the bus? [12]

A. Not other than the door.

Q. Did you see blinker lights on the front of the bus? A. When we passed.

Q. When was that?

A. When we got permission to go, we looked back.

Q. They were blinking?

A. Yes sir.

Q. You are sure of that? A. Yes sir.

Q. You turned around so that you could see, and you saw them? A. Yes sir.

Q. What color was that Covey Truck?

A. It was red with white lettering if I recall right.

(Testimony of Myron Davis Carter.)

Q. Red with white lettering? A. Yes sir.

Q. Did you see this gentleman out there that day?

A. Quite a few out there, I wouldn't recall,—if he was the driver I saw him out there before we left.

Q. Do you know what he did after the accident?

A. No.

Q. Did he stay there?

A. Yes sir, he did for a time, we went just as they left with the boy, I wouldn't say whether he went with the boy or stayed with the truck.

Q. Did you see him with the highway patrolman after the [13] accident?

A. No we didn't, we had gone back to the car at that time.

Q. Did you see the highway patrolman there after the accident?

A. After the accident he was the one that came by.

Q. You saw the highway patrolman after the accident? A. Yes sir.

Q. Now, these distances, you testified that you made no measurements?

A. That's right, they are approximate.

Q. They are guesses? A. Yes sir.

Q. The speed of the truck to which you testified was likewise a guess? A. It is an estimate.

Q. You were on the right side of the car in which you were riding? A. Yes sir.

(Testimony of Myron Davis Carter.)

Q. How could you see the gas truck if you were behind the school bus?

A. We were quite a ways back.

Q. When did you see the truck?

A. About a quarter of a mile down the road.

Q. You didn't have any idea of the speed at which he was travelling?

A. Approximately,—that is as long as it took to go go that distance. [14]

Q. You didn't see it travelling from the time you first saw it until he got to the school bus?

A. Not all of the time.

Q. Your testimony is a pure guess as to the speed?

A. I could tell from the time it took to get over to the bus.

Q. You mean you could tell how fast that was going by telling the time it passed the bus after seeing it on top of the hill?

A. And how fast it was going when it passed the bus and how long it took, and how far it was.

Q. You got only a glimpse of it as it went by going North? A. Yes sir.

Q. Who was sitting between you and the truck at the place where you could see the truck?

A. Mr. Eames.

Q. Who else? A. That is all.

Q. You and Mr. Eames were together?

A. Yes sir.

Q. Wasn't there a car that parked in front of

(Testimony of Myron Davis Carter.)

the car in which you were riding and immediately back of the bus? A. Yes sir.

Mr. Peterson: I believe that is all. [15]

Redirect Examination

By Mr. Davis.

Q. You were asked with reference to the distance on the west side of the road, by that you mean the side the school bus was on,—the West side was the side the Bus was on? A. Yes sir.

Q. And the distance on the east side,—that would be the side that the oil truck was coming down? A. Yes sir.

Q. On the east side of the road there is a driveway? A. Yes sir.

Q. An open place and much more space than there is on the westerly side? A. Yes sir.

Mr. Davis: That is all.

Mr. Peterson: Yes, that is all.

WALDO EAMES

called by the plaintiff as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis.

Q. Your name is Waldo Eames?

A. Yes sir. [16]

Q. Where do you live? A. Preston.

Q. What is your business?

(Testimony of Waldo Eames.)

A. Ranching, farming and stock buying.

Q. You have been subpoenaed here?

A. Yes sir.

Q. You are not related to either of the Plaintiffs?
A. No, I am not.

Q. Where had you been on the 24th day of February 1947 prior to the hour of four-thirty in the afternoon, Mr. Eames?

A. American Falls, to an auction sale.

Q. What was with you that afternoon?

A. Davis Carter.

Q. What time did you leave Pocatello that afternoon, on your way home?

A. About four o'clock, I know the children were out of school.

Q. The children were out of school?

A. Yes sir.

Q. Did you observe a school bus?

A. Yes sir.

Q. Where was that?

A. As we left Pocatello, I could see the school bus ahead of us, we were south of Pocatello.

Q. Did you follow that bus? [17]

A. Yes sir.

Q. What did that bus do from time to time?

A. Stopped to let children off; signalled for a stop with its light.

Q. Do you know what the bus did at Meridell Park or the Owl Club?

A. It pulled up to a stop to let the children off.

(Testimony of Waldo Eames.)

Q. Did you see the children getting off.

A. Yes sir.

Q. What did you do?

A. As the bus started to slow I pulled out to the side of the road to let the oncoming traffic see the signals. I was stopped off on the shoulder behind the bus?

Q. How many other cars were stopped there behind the bus? A. Four or five.

Q. Did you see any truck or vehicle approaching from the south? A. Yes sir.

Q. How far is your vision,—strike that,—for what distance to the south could you see the highway clearly?

A. I would judge near three-quarters of a mile.

Q. Was it straight? A. Yes sir.

Q. Now Mr. Eames, when did you first see this truck or oil tanker or truck coming from the south?

A. I saw it coming as the top of the cab showed over the hill?

Q. That would be approximately three-quarters of a mile away?

A. Yes sir, I guess about that.

Q. Had the school bus stopped then.

A. Yes sir, we had just stooped then.

Q. Was there any other vehicle or truck coming from the south and going north except this oil truck at that time? A. No sir.

Q. What was the fact with reference to the cars traveling south, did they stop?

(Testimony of Waldo Eames.)

A. I was next to the bus until a Montana car came up and noticed the light and ducked in front of me and behind the bus.

Q. Did you notice a state patrolman?

A. Yes sir, they pulled into line.

Q. What do you mean by that?

A. They pulled in the line behind the bus.

Q. What was the approximate speed of the truck as it approached the bus?

A. Forty-five or fifty miles an hour, I would judge.

Q. Tell us what happened there?

A. The children stepped off the bus and walked back to the back of the bus and turned to cross back of the bus and one little fellow was a step or two ahead of the [19] others and he started off a little faster across the road just in time for the truck to contact him when he went past there with his right front lamp and fender.

Q. Did you notice any slackening of the speed of the truck before he was hit?

A. No sir I didn't, I made the statement to Mr. Carter——

Judge Baum: Just a minute, I will have to object to what he——

Mr. Davis: Yes, that might be hearsay.

The Court: Go ahead.

Q. What was the statement that you made at the time there?

Mr. Peterson: Now, Your Honor, we object to this as incompetent, irrelevant and immaterial.

(Testimony of Waldo Eames.)

The Court: I think possibly the statement he made might be objectionable, he may state what he saw there. You can ask him what he saw?

Q. What happened.

A. I made the statement to Mr. Carter——

Mr. Davis: Not what you said to Mr. Carter, what you saw Mr. Eames.

A. What I saw—when I looked after the first contact, the boy was stuck to the side, side of the truck, it was the right side with his head against the fender and lamp and stuck there like a piece of paper as they whizzed by our car. [20]

Q. Did you make any measurements as to how far that truck went after it struck the boy?

A. I would estimate thirty-five paces.

Q. That is how far the truck went?

A. After he hit the child.

Q. Tell us how far, in your judgment, how far the boy stayed stuck to the front of the truck?

A. I would judge it was twenty-five feet past then I heard the brakes of the truck with the little boy and then he rolled toward the north and the center of the road fully twenty feet, then the traffic officer gathered him up in his arms.

Q. When the brakes were applied, the truck slowed down? A. Yes sir.

Q. Was that at the time the boy came off?

A. Yes sir, the time the body rolled on.

Q. What kind of noise did the brake make?

A. Screeched.

(Testimony of Waldo Eames.)

Q. Did you see any lettering on the bus?

A. Yes sir.

Q. What was it?

A. It was a school bus, and it has stamped on it "school bus" and on the side "Independent School District Number One".

Q. Can you give us an estimate of the length of the bus?

A. The body about twenty-five or twenty-six feet, maybe longer, but about that and the entire thing about thirty-two [21] or thirty-four feet.

Q. What color was it painted?

A. Orange and black.

Q. Was the lettering and words stamped on it plainly visible? A. Yes sir.

Q. What was the condition of the road?

A. It was dry.

Q. And what about the weather as to being clear or cloudy? A. It was clear.

Q. When did you leave there?

A. I talked to the school——

Judge Baum: Just answer the question.

A. After I received permission from the school bus driver. I asked if there was anything I could do and he said "no" to go ahead.

Q. You thought you should get permission to go?

A. Yes sir.

Mr. Davis: That is all Mr. Eames.

Cross-Examination

By Judge Baum:

Q. You were driving what kind of car?

(Testimony of Waldo Eames.)

A. A Pontiac 1940 Model.

Q. A yellow one? A. Tan.

Q. You left Pocatello at what time? [22]

A. About four o'clock.

Q. Mr. Carter was with you? A. Yes sir.

Q. In the front seat with you? A. Yes sir.

Q. As you went down the highway to where the accident happened how fast were you travelling?

A. Fifteen or twenty miles an hour.

Q. How far away were you when you first saw the cab of the truck coming over the hill.

A. How far from the school bus?

Q. Yes.

A. We were approximately a hundred yards.

Q. Back of the school bus? A. Yes sir.

Q. You saw the cab of the truck as it came over the hill coming north?

A. That is the first I noticed.

Q. Did you keep your eye on the truck?

A. No.

Q. When did you see it the next time?

A. I pulled the car off the side of the road and saw it until the vision stopped between me and the school bus.

Q. Did you pull out of your line of traffic?

A. Yes sir, off the oil. [23]

Q. How wide was the road beyond the oil on the west side? A. Five feet or more.

Q. How far back of the school bus did you stop?

A. I was, I would say about twenty steps.

(Testimony of Waldo Eames.)

Q. That would be sixty feet.

A. Fifty or sixty.

Q. Another car pulled in ahead of you?

A. Yes sir, he was about to go on and he saw the lights. It was a Montana car, it was a coupe, light, black coupe.

Q. Light, black?

A. Light in weight and low down, one of the new Studebakers.

Q. He pulled ahead of you?

A. Yes sir, down this highway to the corner of the school bus.

Q. He was in the line of traffic?

A. He had two wheels on the oil.

Q. How far ahead of you did he stop?

A. I would judge he was fifteen feet or more.

Q. Ahead of you? A. Yes sir.

Q. And you were back of the school bus how far did you say, about thirty paces.

A. I would judge about twenty steps.

Q. And he was five or six paces ahead of you?

A. About fifteen feet, it looked like about five steps ahead of the car. [24]

Q. As this truck passed the school bus—with- draw that—Now this school bus opened on what side? A. The right hand side.

Q. West side? A. Yes sir.

Q. At the front or the side? A. The front.

Q. How many children got off, do you know.

(Testimony of Waldo Eames.)

A. It was either four or five, I wouldn't be exact on that.

Q. Where did they go?

A. Walked back toward the north on the west side of the school bus and then across toward the east at the back, toward the opposite line of traffic?

Q. Did you see the truck hit the boy?

A. Yes sir.

Q. It carried him how far?

A. Twenty feet or more.

Q. Then the brakes were applied?

A. Yes sir, that is when I heard the brakes.

Q. The boy was on what side of the truck?

A. The right.

Q. East side? A. Yes sir.

Q. The truck was between you and the boy?

A. Yes sir, after it hit I saw clearly, the boy pasted on. [25]

Q. Did I ask you that—just answer the question.

A. Yes sir.

Q. The radiator of the truck was between you and the boy? A. Yes sir.

Q. You saw the boy roll, notwithstanding the fact that the truck was between you?

A. The truck pulled off to the right, the boy rolled down this like of traffic direct to the center and rolled over to the side like you would roll a ball.

Q. When did the oil truck leave its lane of traffic with reference to where your car was standing?

A. It was down the road.

(Testimony of Waldo Eames.)

Q. How far?

A. It looked like it took off about the time he applied the brakes.

Q. About twenty-five feet after it hit the boy, you said, he applied the brakes? A. Yes sir.

Q. You were about twenty paces back of the bus?

A. About twenty-five steps or twenty steps.

Q. After the truck passed you the boy rolled off the truck into your lane of traffic?

A. Down the center to the right, toward the west of the traffic.

Q. To what portion of the truck did you see the boy adhering?

A. The center with his head bent toward the head lamp—sort [26] sort of toward the head lamp and fender.

Q. Did you go down to see the truck?

A. Yes sir, passed two cars and a pickup.

Q. To the front of the truck?

A. To the side where I could see the front, I didn't walk around it.

Q. You didn't walk around?

A. I walked around to the front so it was clear—the front of the truck was clear to me.

Q. Isn't it a fact that when this truck stopped the boy dropped off the bumper, right in front of the truck, and didn't roll at all?

A. I sure saw him roll. When the officer picked him up he had just stopped.

Q. What officer picked him up?

(Testimony of Waldo Eames.)

A. It was the patrolman in uniform.

Q. Do you know this gentleman sitting here (indicating)?

A. No sir.

Q. Did you see him before?

A. Yes sir, out there.

Q. Isn't it a fact that Mr. Bowman picked the boy up?

A. Oh, no.

Q. Isn't it a fact that Bowman put him in the car and the officer was never out of his car?

A. I didn't see him pick him up.

Q. Why did you say the officer picked him up?

A. I didn't see Mr. Bowman.

Q. Did you see the officer pick him up?

A. I saw two officers with a quilt or something and they gathered, or rather covered him up with it.

Q. You saw two officers in uniform?

A. One officer in uniform before two men came out.

Q. The officer did what?

A. He had a tarp or something and covered the boy up.

Q. Both these men that came out did they have uniforms?

A. No, I remember one in full dress uniform.

Q. You saw that policeman drive up in this lane of traffic?

A. His car stopped back of us in this line of traffic.

Q. How long before the accident did this patrolman stop?

(Testimony of Waldo Eames.)

A. Before the accident—I didn't see him before the accident.

Q. How do you know he drove up and stopped in the line of traffic?

A. I saw the car but it was after the accident.

Q. You saw the car pull up in the line of traffic, the line of cars waiting and stopped?

A. Yes sir.

Q. Did that occur before the boy was hit?

A. I think afterward.

Q. Isn't it a fact that the patrolman drove down turned around and stopped by the boy—where the boy was lying?

A. I didn't stay long enough to know whether it was the [28] Sheriff, so far as the officer I know he was in uniform.

Judge Baum: That's all.

Mr. Davis: That's all Mr. Eames.

The Court: We will recess for fifteen minutes.

11:30 A.M., June 2, 1949

Mr. Davis: May I recall Mr Eames for another question or two.

The Court: You may.

WALDO EAMES (Recalled)

Redirect Examination

By Mr. Davis

Q. Mr. Eames, you testified on cross-examination that you saw an officer in uniform?

(Testimony of Waldo Eames.)

A. Yes sir.

Q. You testified with reference to the officer taking the child?

A. Yes sir.

Q. What do you mean by him taking the child?

A. He took him in the car.

Q. You mean——

Judge Baum: We object to what he means, he can state what occurred.

The Court: Let the witness explain.

A. He took him with him in the car, I misunderstood when he said Mr. Bowman took him, I saw the officer take him in the car. [29]

Q. Did you understand that meant that Bowman took him in his car?

Judge Baum: Objected to as leading, I talked about picking him up.

The Court: Witnesses have a hard time on the witness stand, and I think he may answer and explain if he has any explanation he wants to make.

A. What I meant to say was I saw the officer take him, I meant the officer took him in the car.

Q. What did you mean when you said the officer picked him up in a tarp.

A. The officer took him in the tarp.

Q. And he put the boy in the car?

A. He took the boy in the car.

Q. (By Judge Baum): This tarp where did you see this?

A. They had something over him.

Q. You testified they had a tarp?

(Testimony of Waldo Eames.)

A. I said at first a quilt, they had a piece of material.

Q. Was that in the car or out on the road?

A. They wrapped it around the boy.

Q. In the car or when?

A. It looked like they wrapped it around him and put him in the car.

Q. They wrapped it around him while he was out of the car? [30]

A. Yes sir.

Q. In whose arms was it?

A. In whose arms. It was either the truck driver or another man standing there.

Q. Where was the other officer, you said there was two?

A. I saw one man in full uniform.

Q. Then he took this boy in his car?

A. I said the officer took him in the car with him, that is what I meant to say.

Judge Baum: That is all.

Mr. Davis: Yes, that is all.

MR. BISCHOFF

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live Mr. Bischoff?

A. McCammon.

Q. And your business?

A. Farming.

Q. How long have you lived at McCammon?

(Testimony of Mr. Bischoff.)

A. Ten years.

Q. Do you know or are you related to Mr. or Mrs. Checketts? A. No sir.

Q. You have been subpoenaed here to testify?
A. Yes sir.

Q. You have no interest in this matter?
A. None whatever.

Q. Where were you about four-thirty o'clock P. M. on the 24th of February 1947?

A. On the way home.

Q. Where had you been? A. To Pocatello.

Q. Did you see anything unusual happen?

A. Yes sir.

Q. An accident? A. Yes sir.

Q. Did you see a school bus? A. I did.

Q. Did you see it after you left Pocatello that afternoon?
A. Yes sir.

Q. And had you seen the school bus before the accident?
A. Yes sir.

Q. Had you been following it? A. Yes sir.

Q. What is the fact as to whether it stopped previous to this time?
A. At least twice.

Q. Had you stopped each time?

A. Yes sir. [32]

Q. What is the fact as to whether you saw any stop sign any painting when it stopped?

A. Stop sign on the bus showed.

Q. Were there any blinker lights?

A. Yes sir.

Q. What were they doing? A. Blinking.

(Testimony of Mr. Bischoff.)

Q. You know what we are talking about and where the accident happened? A. Yes sir.

Q. Where were you at that time?

A. I was in my pickup.

Q. Who was with you? A. My wife.

Q. Where were you from the school bus?

A. I was the third or fourth car. Three or four cars, I think the third car back.

Q. What happened when the school bus stopped?

A. Four children got off.

Q. Which side did they get off?

A. The right hand side.

Q. What did you see them do?

A. They started around to the back of the bus.

Q. Are you able to estimate the length of that bus from where they got off to the back of it?

A. About thirty feet. [33]

Q. Were there any cars going in the same direction as the bus that did not stop? A. No sir.

Q. What condition were the roads in that day?

A. Good and dry.

Q. What was the weather at that time?

A. It was clear.

Q. Was the sun shining?

A. It was shining.

Q. How far south and past the school bus could you see down the road?

A. Possibly a half mile.

Q. What is the fact as to whether the road is straight for that distance? A. It is straight.

(Testimony of Mr. Bischoff.)

Q. In which line of traffic was the school bus stopped? A. The right hand lane.

Q. Where with reference to the oil, the right hand wheels of the bus—strike that please—where were the wheels with reference to the pavement?

A. Just on the pavement.

Q. Did the children get off on the pavement or on the shoulder? A. On the shoulder.

Q. Did you see a truck approaching from the south? A. I did. [34]

Q. Did you see more than one vehicle approaching from the south at that time? A. Just one.

Q. How fast was it travelling?

A. That is hard to answer.

Q. In your best judgment?

A. Forty-five miles.

Q. Forty-five miles an hour? A. Yes sir.

Q. What did it do, as it approached the school bus?

A. Didn't do anything, just kept coming.

Q. Just kept coming? A. Yes sir.

Q. What happened?

A. This little boy ran behind the bus, started to cross the road and just as he got to the back of the bus the truck was there at the same time and hit him.

Q. What did the truck do after it hit him?

A. Kept on coming.

Q. Did you make any estimate or do you have any judgment as to how far the truck went after it hit him before it stopped?

(Testimony of Mr. Bischoff.)

A. That is hard to say—I would say between a hundred and forty and a hundred and fifty feet.

Q. That is your best judgment?

A. Yes sir. [35]

Q. What happened to the boy when the truck first hit him, where did he stay?

A. On the bumper for a ways.

Q. Then what happened?

A. He skidded along in front of the front wheel of the truck before he rolled to one side.

Q. What color was that school bus?

A. Orange and black.

Q. Any lettering on it?

A. "Independent school district".

Q. Any words—anything with reference to "stop"?

A. "Stop" on the back and lights.

Q. Were they plainly visible? A. Yes sir.

Q. Do you or are you able to give an estimate of what was the height of the bus?

A. The top of the bus?

Q. From the ground to the top of the bus?

A. I would say about eight feet.

Q. Which side of the truck did the boy strike, or which side struck the boy?

A. Mostly the right hand side, two-thirds of the way probably.

Q. How long did you stay there?

A. I don't know. Possibly ten minutes after.

Q. Had any officers come before you left?

A. Yes sir. [36]

(Testimony of Mr. Bischoff.)

Q. Were they making any measurements before you left? A. No sir.

Q. Did you see anyone there in uniform?

A. Yes sir.

Mr. Davis: That is all, thank you Mr. Bischoff.

Cross-Examination

By Mr. Peterson:

Q. When was it you first noticed this bus after you left Pocatello? A. This school bus?

Q. Yes. A. Probably a mile out of town.

Q. At that time how many cars were between you and the school bus?

A. Three—no, two I think.

Q. Do you know who was driving those cars?

A. No, I don't.

Q. Did these two cars remain in front of you up until the time of the accident? A. No sir.

Q. What happened?

A. One went around the school bus.

Q. At what point?

A. After the first stop I think. [37]

Q. After the first stop was there one car between you and the bus? A. Yes sir.

Q. Did that remain between you and the bus until the accident? A. Yes sir.

Q. Where did the other car come in front of you, between you and the bus?

A. It was the car with the Montana license.

Q. It pulled ahead of you.

A. No, it was the second car ahead of us.

(Testimony of Mr. Bischoff.)

Q. As the bus approached Meridell Park by the Owl Club, how far back of the bus did you stop?

A. Possibly a hundred feet.

Q. How far ahead of you was this first car?

A. Seventy or eighty feet.

Q. Then the other car, how far ahead of that car was the Montana car?

A. Fairly close to it.

Q. You think you were about—withdraw that—was the car ahead of you driven by Mr. Eames?

A. I didn't see Mr. Eames there.

Q. Was it a tan Pontiac? A. Yes sir.

Q. You were seventy feet back of this tan car?

A. Yes sir. [38]

Q. Were you on the pavement or off?

A. Off to the side of the pavement.

Q. Where was the tan car?

A. Off the pavement.

Q. Where was the Montana car?

A. On the edge of the pavement, the right hand front was pretty well to the edge, to the right edge of the road.

Q. You didn't see any car parked off on the shoulder? A. No sir.

Q. When did you notice this oil truck?

A. A little while before I stopped.

Q. It would be rather difficult to tell the speed of that truck? A. That's right.

Q. A car coming toward you it is hard to tell its speed? A. Yes sir.

(Testimony of Mr. Bischoff.)

Q. It could have been going twenty-five miles an hour? A. No, it was faster than that.

Q. How far down the road was it when you first saw it? A. About half a mile.

Q. Was the bus stopped at that time?

A. Yes sir.

Q. Were the children out of the bus?

A. They were getting out.

Q. When the truck was a half mile down the road? [39]

A. Yes sir.

Q. How many children?

A. Three or four.

Q. Was there a lapse of time before all the children—withdraw that,—was there a lapse of time between the children getting off the bus?

A. They got off pretty well together.

Q. Where did they go?

A. They stood by the bus a minute or so?

Q. They were all off the bus before any started around it? A. That's right.

Q. They were all off before any started around the bus? A. Yes sir.

Q. Did you notice a rather large boy getting off the bus?

A. Not so very large, I noticed one boy?

Q. Tell the jury the type of children that got off the bus?

A. They were from about ten to fourteen or so.

Q. About the same size?

(Testimony of Mr. Bischoff.)

A. Fairly well the same size, pretty well.

Q. After standing there two or three minutes they started back of the bus?

A. They started toward the back of it.

Q. How many started toward the back of it?

A. It seemed to me there was three of them.

Q. Were those three together? [40]

A. Yes.

Q. Could you see them as they got back of that school bus? A. Yes sir.

Q. No cars between you and the school bus?

A. Two.

Q. But you could see them walk around the bus?

A. That's right.

Q. Those cars were between you and the bus?

A. Yes sir.

Q. How many approached on the highway back of the bus?

A. I noticed some cars.

Q. I mean children.

A. I saw three children.

Q. After you saw them go back of the bus into the lane of traffic were the three together?

A. No, just one.

Q. You saw the *bus* hit the boy? A. I did.

Q. You say it was about half between the middle of the radiator and the right fender?

A. That's right.

Q. Where was the boy when the truck passed you?

(Testimony of Mr. Bischoff.)

A. Ahead of the truck front wheel on the pavement skidding along.

Q. They had travelled about eighty or seventy feet before [41] it got to you?

A. Around a hundred.

Q. And it travelled how much farther?

A. Probably fifty feet.

Q. Then what happened?

A. Well, I noticed the state patrol car.

Q. Did the truck stop. A. It did.

Q. Where did the truck stop in reference to the boy's body?

A. That is rather hard to say, I think about ten feet back of where the boy stopped.

Q. Were you in the car or out at that time?

A. In the car.

Q. The truck was between you and the boy's body? A. No.

Q. The body was on the pavement?

A. Yes sir.

Q. Was there any car back of you that stopped?

A. Yes sir.

Q. How many cars back of you that stopped?

A. Around three or four.

Q. About seven cars all told? A. Yes sir.

Q. Did you see the patrolman drive up?

A. I did. [42]

Q. When did he drive up in reference to the time of the accident?

A. Just as it happened.

(Testimony of Mr. Bischoff.)

Q. He didn't stop in the line of traffic?

A. I don't know, he was by the boy.

Q. Do you know who picked the boy up?

A. No sir.

Q. You know Mr. Bowman? A. I don't.

Q. You saw him there? A. Yes sir.

Q. Did he pick the boy up?

A. I couldn't say.

Q. Did you get out of your car?

A. Not until after they picked the boy up?

Q. Who took him?

A. The State patrol car.

Q. Who carried him to the car?

A. I couldn't say.

Q. Did the officer carry him to the car?

A. I couldn't say.

Q. Did you see any tarp there?

A. I did not.

Q. You think this bus is about eight feet high from the ground?

A. From the ground to the top. [43]

Q. That's right? A. Yes, I think so.

Q. This word "stop" was that on the light?

A. The stop sign just above the light.

Q. Just above the light. A. Yes sir.

Q. It is not on the light? A. No.

Q. Where is the light?

A. On the left hand side.

Q. The left hand side? A. That's right.

Q. One light there?

(Testimony of Mr. Bischoff.)

A. Several on the back of the bus.

Q. Describe them. This "stop" is where with reference to the back of the bus?

A. On the left hand side.

Q. Is it on the light or painted?

A. One painted and stop sign on the light.

Q. There is a painted sign on the left hand side?

A. As near as I remember.

Q. There is "stop" on the glass?

A. Yes sir.

Q. How many lights had "stop" on?

A. One. [44]

Q. Where is that? A. On the back light.

Q. Where was the light that had the word "stop" on it located?

A. On the left hand side.

Q. On the left side? A. Yes sir.

Q. There were some other lights,—what were they? A. Blinker lights.

Q. Where were they?

A. On the back of the bus.

Q. How were they located on the back?

A. I think there were some on the body and some on the bottom.

Q. Some of them on the back and some on the bottom? A. Yes sir.

Q. How many blinker lights on the top?

A. I couldn't say.

Q. Was there one of more?

A. I think about two.

(Testimony of Mr. Bischoff.)

Q. How many on the bottom?

A. I think about one or two.

Q. About one. A. Yes.

Q. This one on the bottom of the bus body where was it? A. I couldn't say.

Q. Where was it located from this stop light?

A. It is over a ways, I think they had them on each corner, [45] the same as trucks.

Q. You think there was three blinker lights, two up and one lower? A. Yes.

Q. Were those stop lights working?

A. They were.

Q. Were the blinker lights working?

A. Yes sir.

Q. Working at the time of the accident?

A. They were.

Q. Was there a side-arm on this bus?

A. I couldn't say.

Q. Was it working? A. I couldn't say.

Q. When you drove by did you see one?

A. I think I did.

Q. Was it up?

A. I am not sure, I think it was.

Q. You say the time you passed that bus you saw the side-arm on the bus?

A. Yes, I think I noticed that.

Q. You don't know whether it was up or down?

A. No sir, I couldn't say.

Q. What side was it on?

A. The left hand side, on the front.

(Testimony of Mr. Bischoff.)

Q. Did you see lights on the front of the bus?

A. No.

Q. Don't know whether there was any there or not?

A. No sir, I couldn't say.

Q. You think you were there about ten minutes?

A. Yes, as near as I can tell.

Q. None of the officers had come to the scene at the time you left, other than this patrolman?

A. No sir, no others.

Mr. Peterson: That is all.

Redirect Examination

Q. Mr. Bischoff, the question was propounded to you by counsel that stated "did you see the bus hit the boy" and you answered "yes". What did you mean hit him?

A. The truck.

Mr. Peterson: I meant to say the truck.

Mr. Davis: That is what I thought.

Q. You testified that the children stopped a little bit, I think you said possibly a minute.

Mr. Peterson: Objected to that is not what the record shows.

The Court: I think the witness so testified.

Q. Is that what you testified to?

A. Yes.

Q. Then you were asked the question "the children stopped two or three minutes" and you answered "yes" did you mean they were three minutes,—strike that,—did you mean that they were there two or three minutes,—did you mean to answer that question in that way?

(Testimony of Mr. Bischoff.)

A. No sir, not in front of the bus.

Q. And your testimony is that the children were there about a minute? A. Yes sir.

Q. This thing you saw on the side of the bus did it have orange rings around it?

A. Yes sir.

Mr. Davis: That is all.

Recross-Examination

By Judge Baum:

Q. How long was it?

A. Possibly a foot and a half.

Judge Baum: That's all.

Mr. Davis: Yes, nothing more.

The Court: We will recess at this time until 1:30.

1:30 P.M. June 2, 1949

MRS. MARGARET BISCHOFF

Called by the plaintiffs as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [48]

Q. Will you please give your name?

A. Margaret Bischoff.

Q. Mrs. Bischoff, you have never been a witness in any case before? A. No sir.

Q. You are fearful of being a witness?

A. Rather, yes.

(Testimony of Mrs. Margaret Bischoff.)

Q. I will ask the questions briefly. Your husband testified this morning? A. Yes sir.

Q. You were riding with him when the accident happened to the little boy? A. Yes, I was.

Q. Tell us in your own language what you saw?

A. We were coming home from Pocatello; we stopped behind this school bus. It stopped twice,—this truck came toward the bus and this little fellow came from behind the bus and it hit him.

Q. What happened at that time?

A. I cannot tell you, I threw my hands over my face I couldn't watch it. When things like that happen you cannot watch it.

Q. You don't know what happened after the boy was struck? A. No, I couldn't tell you.

Q. How far could you see the truck? [49]

A. Quite a distance.

Q. Do you know whether it slackened up its rate of speed?

A. No, it didn't until after it hit the boy?

Q. Did you observe anything on the bus?

A. Yes sir, blinking lights like all school buses do, and this great big "stop" in black letters.

Mr. Davis: That is all.

Cross-Examination

By Judge Baum:

Q. How did you know the truck didn't slow up until after it struck the boy?

A. It was coming at a good gait and it didn't throw on its brakes until after it hit.

(Testimony of Mrs. Margaret Bischoff.)

Q. Not knowing how fast it came how could you tell it didn't slow up?

A. I don't think he did.

Q. You don't know.

A. I don't think he slowed up.

Q. Those lights were on the back of the bus?

A. Yes sir.

Q. And this painted sign? A. Yes sir.

Q. How many blinking lights were there?

A. I couldn't say.

Q. They were blinking? [50] A. Yes sir.

Q. You drove away with the lights blinking?

A. No, we stayed until they told us that we could go.

Q. Were the lights blinking when you left?

A. I think so. I saw them blinking.

Mr. Baum: That's all.

Mr. Davis: That's all thank you Mrs. Bischoff.

REED HOWE

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name please? A. Reed Howe.

Q. Where do you reside?

A. 1165 South 8th East Salt Lake City, Utah.

Q. You are married? A. Yes sir.

Q. You formerly lived in Pocatello?

(Testimony of Reed Howe.)

A. Yes sir.

Q. Mr. Howe, on the 24th day of February 1947 what was your occupation at that time?

A. Idaho State patrolman.

Q. What we call a traffic officer? [51]

A. Yes sir.

Q. Mr. Howe, calling your attention to the time, approximately 4:30 of that date near Meridell Park do you remember being there and do you remember something unusual that happened?

A. Yes sir.

Q. What was the condition of the roads that day? A. They were dry.

Q. They were dry? A. Yes sir.

Q. What was the condition of the weather?

A. It was a clear day with the sun shining.

Q. Do you have in mind and do you know where the school bus stopped that day? A. Yes sir.

Q. South from that bus how far was the road straight.

A. About, maybe little less than half a mile.

Q. Could you see clearly down that stretch of road for that distance? A. Yes sir.

Q. Tell us what you saw happen there?

A. I saw the school stopped and some cars behind it. I saw some children get off and one of the children ran around behind the bus and a truck was coming from the south going north and hit this child.

Q. Which side of the highway or which lane of

(Testimony of Reed Howe.)

traffic [52] was the truck in which hit the boy?

A. In the east going north.

Q. On the right hand side in the correct lane?

A. Yes sir.

Q. Which side of the bus?

A. He was on the west side in his right lane of traffic.

Q. In his right lane of traffic? A. Yes sir.

Q. Can you tell us approximately where the truck was at the time you saw the children getting off?

A. He was coming from the south, as I recall there is a gradual slope just before it gets to the hill, he was about half way down this slope toward the bus.

Q. That would be about a quarter mile away?

A. Yes sir about a quarter.

Q. At that time the children were off and by the bus? A. Yes sir.

Q. How far back of the bus were you when you saw it was stopped?

A. At least half a mile, maybe a little less.

Q. You kept driving toward the bus?

A. Yes sir.

Q. What is the fact as to whether you had come to a complete stop at the time you saw the accident?

A. I was still driving south. After seeing the accident I [53] went up between these cars and turned around facing back toward town.

Q. Where was the boy at that time?

(Testimony of Reed Howe.)

A. He was laying on the pavement at the left side of the front of the truck.

Q. Where was the boy with reference to the center of the pavement,—the center line.

A. At that time, well, I don't recall but I think it is on the accident report.

Q. Mr. Howe, was the boy taken from that place in anybody's car?

A. In the car I was driving at that time for the State.

Q. Who picked the boy up in their arms and put him in the car? A. Mr. Bowman.

Q. In the back of your car was there any blanket or anything?

A. There was a blanket in the back seat of the car.

Q. What was done with the blanket?

A. It was left in there.

Q. Was the boy placed on the blanket or the blanket put around him?

A. At that time I don't remember now, but I remember he was partly on it. I think he was on Mr. Bowman's lap or partly on his lap all the way in to Pocatello.

Q. What was the condition of the boy when you arrived in [54] Pocatello as to whether he was alive or dead?

A. I wouldn't know, I waited for the Doctor for his decision.

Q. Waited until the Doctor saw him?

(Testimony of Reed Howe.)

A. Yes sir.

Q. What did you do then?

A. I took Mr. Bowman and went back to the scene of the accident.

Q. Did you, or had you reported the matter to anyone?

A. Yes sir.

Q. To who?

A. To the Bannock county Sheriff's office.

Q. Was anyone there when you got out there on your return to the scene of the accident?

A. Deputy Sheriff Ray Reynolds.

Q. The cars stopped behind the bus, had they gone at that time?

A. I am pretty sure they were, yes sir.

Q. Did you or Mr. Reynolds take any measurements?

A. Yes sir.

Q. What did you measure?

A. We determined the point of impact as near as we could and took measurements to where the truck stopped; measurements of the width of the highway and how wide the shoulders were. It was all put on the accident report. It is so long ago I wouldn't remember exactly. [55]

Q. Do you remember how many feet it was from the point of impact to where the truck stopped?

A. I think it was 133 feet.

Q. Do you remember without seeing the accident report how wide the shoulder was on the west of where the truck stopped?

A. It was four or five feet as I remember.

(Testimony of Reed Howe.)

Q. Now, on the east side directly opposite the bus, in the line of traffic that the truck came was there a shoulder there? A. Yes sir.

Q. How wide was that?

A. I cannot remember but it was quite wide as I remember there was no dirt shoulder. There was parking facilities there for that club or something like that.

Q. On the right hand side of the truck going north how many feet was available for traffic, or safe for cars?

A. As near as I remember it was around twenty feet.

Q. Do you know the height of this truck?

A. No.

Q. Do you know the length of it? A. No.

Q. Did you observe any foot prints any place there? A. Yes sir.

Q. What kind were those? [56]

A. Foot prints of the children where they got out of the bus on the shoulder, where they had gotten out of the bus.

Q. Was there any lettering on this bus?

A. Yes sir.

Q. What was that?

A. Sign that said "school bus stop" on the back of the bus, "Independent School District Number one," on the side.

Q. What color was the school bus?

A. Standard school bus, yellowish orange.

(Testimony of Reed Howe.)

Q. What color were the letters? A. Black.

Q. Plainly visible? A. Yes sir.

Q. Did you see, or were you able to see whether or not the lights were blinking?

A. I seen lights on the back of the bus.

Q. Now, did you say anything to Mr. Bowman?

A. Yes sir.

Q. When he first came up? A. Yes sir.

Q. What did you say?

A. I asked if he didn't know he was supposed to stop when he met a school bus.

Q. Did he make a reply?

A. As I remember he said he didn't know. [57]

Q. Was anything said by Mr. Bowman as to the rate of speed he was travelling? A. Yes sir.

Q. What did he say?

A. He said about thirty-five. I asked him how fast he was going and he said about thirty-five miles an hour.

Q. Do you know now or did you afterwards determine whether Gary Checketts was alive or dead?

A. State that again.

Q. Do you know now, or did you afterward,—after the accident determine whether or not Gary Checketts was alive or dead?

A. The only report I had was from the Doctor.

Q. Do you know what kind of truck this was?

A. Yes sir.

Q. What kind was it? A. Federal truck.

Q. What type?

(Testimony of Reed Howe.)

A. Gas delivery truck, I think they rate them at a ton and a half.

Q. One or two of these questions that I have asked you, not having seen the accident report, and it having been more than two years ago, you are not clear on? A. That's right. [58]

Mr. Davis: That is all Mr. Howe.

Cross-Examination

By Mr. Peterson:

Q. When you were talking to Mr. Bowman, did he say that he didn't know or didn't think he had to stop when he was coming in the opposite direction,—isn't that what he said?

A. That was later he said that.

Q. I will ask you if you haven't heretofore testified and if you were asked the question "what did Mr. Bowman say" and if your answer was "I asked if he didn't know he was supposed to stop for a school bus and he replied as I remember he said he didn't think he had to stop when he was coming from the opposite direction?"

A. If that is—

Q. —just a moment, let me ask you if that isn't the testimony you gave in this matter?

A. If it is in that record.

Mr. Davis: What record is that?

Judge Baum: The reporter's transcript.

Q. Where were you when you first noticed that the school bus stopped?

A. There was a group—

(Testimony of Reed Howe.)

Q. How far back were you?

A. There is a curve in the road that I went around, and the [59] road goes into a gradual dip to go up to Meridell Park, I had just come around the curve less than a half that way.

Q. Was the bus in the lower part of the dip?

A. Yes.

Q. The road raises and dips on each side of where the bus was? A. Slightly.

Q. On both sides of where it was?

A. Yes sir.

Q. So you have in this line of traffic with your car stopped immediately back of the school bus,—

A. no,—I was not stopped there, the others were.

Q. What was the first thing you observed as you came around the curve?

A. I noticed the school bus stopped and cars behind it.

Q. What did you see next?

A. Children get out.

Q. Then what did you see?

A. One little boy start across the highway.

Q. Was there a car or cars between you and the bus? A. Yes sir.

Q. How many?

A. I think,—yes, as I recall there was three or four.

Q. What else did you observe?

A. I saw this red truck coming toward the north. [60]

(Testimony of Reed Howe.)

Q. You were driving along the highway when you saw the truck? A. Yes sir.

Q. Where was this red truck when you first saw the bus was stopped, if you know?

A. It was ahead of the bus around a quarter of a mile, yes about a quarter of a mile ahead of the bus.

Q. The children were not out of the bus at that time when you first saw the bus stopped?

A. I saw the bus and truck and the children about the same time.

Q. You looked down saw the bus stopped and the children getting out of the bus and the next thing you saw was the children coming back of the bus? A. Yes sir.

Q. What was the next thing you saw?

A. The truck hit the boy.

Q. Where did the boy ride on the truck when he was hit?

A. The right fender and the bumper.

Q. Where were you when the truck stopped, where were you on the highway?

A. I must have been up the road another fifty yards.

Q. When the truck stopped you were up the road about fifty yards? A. As near as I recall.

Q. You drove up turned around at that time?

A. Yes sir. [61]

Q. You didn't get out? A. No sir.

(Testimony of Reed Howe.)

Q. You drove up behind these cars to a place opposite the truck and turned around.

A. Yes sir.

Q. And you say you didn't get out of the car?

A. Not at that time.

Q. Not at that time. A. No sir.

Q. What happened then Mr. Howe?

A. I stopped.

Q. And what happened?

A. Mr. Bowman got out picked up the boy, I opened the back door and he put the boy on the back seat.

Q. Was there any other man there helping Mr. Bowman? A. Not that I recall.

Q. Was there any other patrolman there?

A. No sir.

Q. Where did Mr. Bowman go when he put the boy in the back seat of your car?

A. He got in with him.

Q. And he rode to the hospital with you?

A. Yes sir.

Q. And after being in the hospital a short while you and Mr. Bowman returned to the scene of the accident? A. Yes sir. [62]

Q. And that is when you saw Mr. Reynolds?

A. Yes sir.

Q. The Deputy Sheriff. A. Yes sir.

Q. And you and Mr. Reynolds made some measurements? A. Yes sir.

Q. When did you see these lights that you were

(Testimony of Reed Howe.)

talking about? A. When I first seen this bus.

Q. They were working then? A. Yes sir.

Q. How many on the back of the bus?

A. There are two on the back but I think I only seen one then.

Q. Was that a blinker light?

A. I don't know.

Q. You know what a blinker light is?

A. Yes sir.

Q. When you drove up there, right after the accident, you didn't see the light then?

A. Repeat that will you?

A. When you drove up the first time did you see the light on at that time?

A. I didn't look at the bus at that time.

Q. When you came back the second time was the light on? A. No. [63]

Q. The blinker light wasn't on? A. No.

Q. They were tried and wouldn't work,—you were there when it was tested? A. Yes sir.

Q. The blinker lights would not work?

A. One would.

Q. Isn't is a fact that when one doesn't work the other doesn't?

A. I am talking about the stop light.

Q. Isn't it a fact that when you came back after being at the hospital the blinker light wouldn't work? A. That's right.

Q. This school bus was never hit by this truck?

A. No sir.

(Testimony of Reed Howe.)

Q. Nothing came in contact with the school bus?

A. No sir.

Q. Did you try these blinker lights in the front when you were back there the second time?

A. I think so, yes.

Q. They wouldn't work in front would they?

A. No.

Q. Mr. Bowman cooperated with you in every way possible didn't he, Mr. Howe?

A. Yes sir, he did. [64]

Mr. Peterson: That's all Mr. Howe.

Redirect Examination

By Mr. Davis:

Q. You had on a uniform at that time?

A. Yes sir.

Q. A regular uniform? A. Yes sir.

Q. This test that you were asked about, about the blinker—the blinker lights, that was made over a half hour afterward, after the bus had completed its run and come back to the scene?

A. Yes, that is as I recall it.

Mr. Davis: That is all.

Mr. Peterson: That's all.

MRS. LAVERN HARDMAN

called by the plaintiffs as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Mrs. Hardman, did you know Gary Checketts during his life time? A. Yes sir.

(Testimony of Mrs. Lavern Hardman.)

Q. On the 24th of February, 1947 what were you engaged in, what was your occupation at that time?

A. I was a school teacher in the Pocatello system. [65]

Q. Was Gary Checketts in your classes?

A. Yes he was.

Q. Do you remember the occasion of him losing his life? A. Yes sir, I do.

Q. Was Gary a healthy active boy?

A. Yes sir.

Q. Was he bright in school?

A. Yes sir, I considered him a good student.

Q. A nicely behaved boy? A. Yes sir.

Q. Did he show good training?

A. Yes sir.

Q. And did you consider him an intelligent, active, normal boy? A. Yes, I did.

Q. Calling your attention to exhibit 1 which has been marked by the Clerk, I will ask you if that is a fair and good likeness of Gary Checketts?

A. Yes, it is.

Q. A fair likeness of him at the time he lost his life? A. Yes sir.

Mr. Davis: We offer in evidence at this time, exhibit 1.

Mr. Peterson: We object to it as entirely immaterial. [66]

The Court: It may be admitted, and you may hand it to the jury.

(Testimony of Mrs. Lavern Hardman.)

Mr. Davis: That is all Mrs. Hardman.

Judge Baum: No questions.

R. J. REYNOLDS

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is R. J. Reynolds?

A. Yes sir.

Q. Mr. Reynolds, what position did you hold or occupy in Bannock County, Idaho, on the 24th day of February, 1947?

A. Chief Deputy Sheriff.

Q. On that day was an accident reported to you?

A. Yes sir.

Q. I am referring to the time of about four-thirty in that afternoon?

A. Yes sir, there was.

Q. And did you make an investigation?

A. Yes sir.

Q. Did you go to the place of the accident?

A. Yes.

Q. Who reported the matter to you? [67]

A. Reed Howe, the State policeman.

Q. What did you do when you got to the scene of the accident?

A. When I got to the scene of the accident there was a truck setting on the right hand side of the highway facing toward town, that truck was coming in from the south, that was just this side of the

(Testimony of R. J. Reynolds.)

entrance to Meridell Park, and I noticed a blood splotch on the pavement in front of the truck. I walked back toward the entrance to Meridell Park. At that time this school bus driver had returned to the scene with the school bus and Mr. Howe when he reported it to us had reported that he had—

Mr. Peterson: We object to what he was told.

Q. Did Mr. Howe then come back to the scene of the accident? A. Yes sir.

Q. While you were there? A. Yes sir.

Q. And did you and Mr. Howe make any measurements? A. Yes sir.

Q. Did you determine the point of impact between the truck and the boy? A. Yes sir.

Q. How did you do that?

Q. Well, we first examined the highway on the opposite [68] side from where the truck was parked across the street from the entrance to Meridell Park where there were a lot of foot prints on the shoulder of the road. They were children's foot prints, then we measured the bus from the front exit where the children would get off back 26 feet, that was the length of the bus from the exit to the rear; directly across the highway was the heel off a shoe, and that is where we considered the only mark that we could use for a point of impact.

Q. From the point of impact to where the truck stopped did you measure that with a tape line?

A. Yes sir.

Q. How far was that?

(Testimony of R. J. Reynolds.)

A. One hundred and thirty-three feet.

Q. That was from the point of impact to where the truck stopped? A. Yes sir.

Q. Who assisted you in measuring that?

A. Mr. Howe.

Q. Did you take a picture of the truck involved in this accident? A. Yes sir.

Mr. Davis: I will have this marked as plaintiff's exhibit 2.

Judge Baum: When was that taken?

A. That same afternoon. [69]

Judge Baum: By you? A. Yes sir.

Q. Is that a fair likeness of that truck?

A. Yes sir.

Q. I call your attention to what would be the right hand side of the truck—no I withdraw that question and consent that it be stricken.

Q. Did you examine the truck personally?

A. Yes sir.

Q. Did you see any dents or marks or placed *what* it had struck anything or anything had struck it?

A. Yes sir, the right front fender had a dent in it.

Q. The right front fender?

A. Yes sir, and the headlight was bent.

Q. On the right side? A. Yes sir.

Mr. Davis: We offer this exhibit in evidence.

Judge Baum: No objection.

(Testimony of R. J. Reynolds.)

The Court: It may be admitted and you may show it to the jury.

Q. Mr. Reynolds how far from where you determined the point of impact to be was it to where you saw this blood spot?

A. The blood spot was after the truck had stopped, it was on the pavement in front of the truck. When I first got to the scene of the accident the truck was there [70] by itself.

Q. The truck was standing there when you got there? A. Yes sir.

Q. And the blood spot was where with reference to the truck? A. In front of it.

Q. Where was the truck on the pavement line of traffic?

A. On the right hand side as you come to town, on the edge of the pavement.

Q. On the east edge? A. Yes sir.

Q. Who moved the truck from there?

A. I think the driver did.

Q. Did you at any time observe this school bus as to what lettering was on it?

A. I have seen a number of them but I don't know.

Q. What color was the school bus?

A. Yellow.

Q. Do you know yourself whether it had any lettering that said "stop" printed on it?

A. I don't recall.

Q. Did you take any measurement as to the

(Testimony of R. J. Reynolds.)

height of it? A. The height of the bus?

Q. Yes? A. No, I didn't.

Q. Do you know its seating capacity?

A. I don't know. [71]

Q. What was the overall length?

A. It was about 32 feet.

Q. Twenty-six feet from the door to the back of it? A. Yes sir.

Mr. Davis: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. When you got out to the scene of the accident the school bus wasn't there? A. No sir.

Q. So you don't know other than what you observed on the ground, where the school bus stopped and the children got out? A. No.

Q. You don't know when this dent was made on the fender of the truck of your own knowledge?

A. No.

Mr. Peterson: That is all.

Mr. Davis: That's all.

ALMA MARLEY

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [73]

Q. You are the Sheriff of Bannock county, Idaho? A. Yes sir.

(Testimony of Alma Marley.)

Q. And you were Sheriff of this county on the 24th day of February, 1947? A. Yes sir.

Q. At that time Sheriff, were you familiar with the road and highway at Meridell Park and on either side of it? A. Yes sir.

Q. Subsequent to that time did you make any observation or measurement on the highway at that point, at the highway near Meridell Park?

A. Yes sir.

Q. What were those measurements made for?

A. For the purpose of learning how far a driver coming from the south could see a school bus at the place this school bus was stopped?

Q. Was the measurement made from a school bus that stopped at Meridell Park?

A. Yes sir.

Q. You drove south from there?

A. Yes sir.

Q. How far from that point was the school bus plainly visible?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, it has not been shown here that the visibility was the same as at the time of the accident. [74]

The Court: He may answer, it has been testified that the weather was clear on the day of the accident. It can be shown here now if the weather was clear when the measurement was made.

A. Six-tenths of a mile.

Q. Were you in a conveyance of some sort?

(Testimony of Alma Marley.)

A. Yes sir.

Q. What were you in?

A. A DeSoto sedan.

Q. What was the condition of the weather?

A. It was clear.

Q. When you made this measurement?

A. Yes sir.

Q. Did you stop your car at the distance you could see? A. Yes sir.

Q. Did the school bus stop opposite Meridell Park? A. Yes sir.

Q. Could you see it plainly from a distance of six-tenths of a mile? A. Yes sir.

Q. Was there anything in the road at that time to obstruct one's vision? A. No sir.

Q. I hadn't finished my question.

A. Pardon me.

Q. Was there anything in the road at that time to obstruct [75] one's vision in coming from the south and going north from the point you stopped to Meridell Park that day? A. Nothing.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Peterson:

Q. All you know is that someone told you the point where the school bus stopped and you measured it?

A. They told me that is where the school bus stopped?

Q. When was it?

(Testimony of Alma Marley.)

A. I don't recall how long after the accident.

Q. About how long?

A. I think it might have been two or three months.

Q. What was done?

A. The driver of the school bus drove it over there—he drove out there and stopped and I drove south and came back until I could see the bus?

A. That is all you know?

The Court: That is not quite fair to ask the Sheriff that question, he has testified as to what happened.

Q. All you know is what they told you about where the bus stopped?

A. That is all I know about that.

Mr. Peterson: That's all. [76]

Redirect Examination

By Mr. Davis:

Q. Was the man driving the bus the day you inspected it and made these measurements the same man who drove it at the time of the accident?

A. No sir.

Q. Then there didn't anybody tell you about the bus stopping at the place at the time you saw it stopped, you saw that yourself.

A. Yes sir, I saw it stopped there.

Mr. Davis: That's all Sheriff.

Mr. Peterson: That is all.

R. M. PUGMIRE

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is R. M. Pugmire?

A. Yes sir.

Q. What is your occupation?

A. Police Officer.

Q. How long have you been a police officer?

A. Roughly about thirty years?

Q. In Bannock County?

A. Yes sir. [77]

Q. At one time did you act as State patrol officer.

A. No sir.

Q. Have you ever acted as patrol officer or motor cycle officer? A. Yes sir.

Q. Have you had other training in that line?

A. Yes sir.

Q. Where was that? A. With the F.B.I.

Q. How long was that?

A. About three years.

Q. You have had—strike that—have you had any experience with automobiles or motor vehicles and speeds of the same? A. I have.

Q. And over what period of time?

A. Off and on during the entire time I have been a police officer.

Q. Have you made investigation and studies as

(Testimony of R. M. Pugmire.)

to the distances within which motor vehicles can be stopped at certain rates of speed?

A. Yes, I have.

Q. I will ask you Mr. Pugmire, assuming that the pavement in the vicinity of Meridell Park is dry and that a motor vehicle—what has been described as a one and a half ton truck with the brakes in good condition [78] on that highway can you tell how long or what distance would it take that truck to stop if it were traveling at a rate of fifty miles an hour?

Judge Baum: We object to that as no proper foundation has been laid, and not all of the circumstances have been detailed upon which it is necessary to base an opinion or answer.

Mr. Davis: Maybe that I didn't ask Mr. Bowman the condition of the brakes on the truck at the time I have him on the stand, if I didn't I will ask to have this witness leave the stand for the present and call Mr. Bowman again.

The Court: You may do that.

RALPH L. BOWMAN

recalled as a witness by the plaintiff, testifies as follows, having heretofore been sworn.

Direct Examination

By Mr. Davis:

Q. Mr. Bowman, on the 24th day of February, 1947, the truck you were driving, did it have four

(Testimony of Ralph L. Bowman.)

wheel brakes? A. Yes sir.

Q. Were they in good condition?

A. Yes sir.

Q. Was it known as a ton and a half truck?

A. Yes sir.

Q. Federal truck? [79] A. Yes sir.

Q. Near Meridell Park where the accident happened, that was a paved highway?

A. Yes sir.

Q. The pavement was dry? A. Yes sir.

Mr. Davis: That's all of this witness.

Judge Baum: No questions.

R. M. PUGMIRE (Recalled)

Direct Examination

By Mr. Davis:

Q. Mr. Pugmire, assuming that on the 24th day of February, 1947, near Meridell Park on a dry paved road, with a Federal one and a half ton truck with four wheel brakes, in good condition, at what distance could the truck be stopped while traveling at fifty miles an hour, upon application of the brakes?

Mr. Peterson: May I ask a question, looking to an objection?

The Court: Yes, you may.

By Mr. Peterson:

Q. The answer you have in mind is based upon actual tests you have conducted Mr. Pugmire?

A. No sir. [80]

Q. Actual tests that you have seen conducted?

(Testimony of R. M. Pugmire.)

A. Yes sir.

Q. Have you observed the conducting of the tests yourself? A. Some of them.

Q. Is it based wholly or in part on any chart or record that you may have read?

A. Partly.

Mr. Peterson: Now, Your Honor, we submit that the evidence upon which he predicates or intends to predicate his answer is hearsay if it is based upon charts or records?

Q. (By Mr. Davis): Did you observe this kind of truck with this kind of tires under these circumstances?

A. I am not familiar with the type of tires. I have made tests with trucks similar to this truck?

Q. You conducted those tests yourself?

A. Yes sir.

Q. When were those conducted?

A. They are not numerous and spread over a number of years that particular type of truck.

Q. Did you make any written memorandum of those tests? A. Yes, we have records.

Q. (By Mr. Peterson): Are you testifying from records you made of those tests you took yourself? A. No. [81]

Mr. Peterson: We submit that the witness is not qualified to draw a conclusion.

The Court: He may answer.

A. At that particular speed of fifty miles an hour if the roadway and the brakes on the truck were in top shape if the road was dry and the

(Testimony of R. M. Pugmire.)

brakes were applied forcibly the driver should stop the car in two hundred and eight feet.

Q. At what distance could the truck be stopped at a speed of forty-five miles an hour under the same conditions?

A. I am going to have to refer to the chart.

Mr. Peterson: We object to that; we don't know the reliability of the chart nor its origin.

The Court: Objection sustained.

Q. Mr. Pugmire, what do you have reference to?

A. I have a chart adopted by the associations as a uniform traffic control for traffic regulations, it is approved by and is a standard for the American Standards Association, and adopted by the AAA and police officers generally in computing these figures.

Q. As I understand it now, you are basing your testimony on your own actual experience and tests and on your study of this particular publication, what you are talking about is in this standard publication? A. That is correct.

Q. It is easier to look at that to see that your answer is [82] correct than to compute it?

A. That's right.

Q. You could examine the chart and then come back and testify could you?

A. Yes sir. Now, at what speed again, did you say.

Q. I will ask you what would be the normal stopping distance of the truck under those condi-

(Testimony of R. M. Pugmire.)

tions I mentioned going at a speed of forty-five miles and hour, and if you need to refresh your recollection do so.

Mr. Peterson: We object to that as incompetent.

The Court: He may answer.

A. One hundred sixty-eight feet.

Q. And at a speed of forty miles an hour under the same conditions?

A. One hundred thirty-seven feet.

Q. And at thirty-five miles and hour?

A. One hundred nine feet.

Mr. Davis: That is all.

Cross-Examination

By Mr. Peterson:

Q. Does it make any difference if the truck is loaded or empty?

A. It should not make any difference.

Q. You say it does not make any difference whether it is loaded or empty?

A. It is the practical stopping distance under all conditions [83] providing the truck is in tip-top shape so far as brakes and tires are concerned.

Q. Does it make any difference if the truck is loaded?

A. This is the practical stopping distance under those conditions I mentioned.

Q. It is your opinion that it would not make any difference whether it was loaded with a ton and half of material or whether it carried none?

(Testimony of R. M. Pugmire.)

A. Yes it would. We could stop it short of that distance.

Q. Does it make any difference whether it is loaded or empty? A. Yes sir, I think so.

Q. You have changed your testimony?

A. No sir.

Q. What difference does it make if it is loaded or empty?

A. It could be stopped short of that distance.

Q. If it was loaded?

A. No, empty.

Q. Does it make any difference as to the type of tires the truck has? A. Yes sir.

Q. And does it make any difference whether the tires are fully inflated or partly? A. Yes sir.

Q. Does it make any difference whether the road is down or [84] up hill? A. Yes sir.

Q. And does it make any difference whether the surface is smooth or concrete or corrugated?

A. Yes sir.

Q. (By Mr. Peterson): We move to strike the answers of this witness as to the matter upon the ground that there are innumerable important considerations not considered by the witness in this case.

The Court: The motion will be denied.

Mr. Peterson: That is all.

Mr. Davis: No other questions.

NORELL CHECKETTS

called as a witness by the plaintiffs, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name is Norell Checketts?

A. Yes sir.

Q. And you are one of the plaintiffs in this case?

A. Yes sir.

A. This is your wife that sits here?

A. Yes sir.

Q. And this is your son Doyle? (Indicating.)

A. Yes sir. [85]

Q. Where did you live on the 27th—excuse me the 24th of February, 1947?

A. Meridell Park, south of Pocatello.

Q. Do you know the width—withdraw that—was it customary of you and Mrs. Checketts to send your son Gary to school in Pocatello?

A. Yes sir.

Q. How did he come to school?

A. By bus.

Q. School bus? A. Yes sir.

Q. And how long had you been living at that place?

A. About three or four months.

Q. What was your occupation?

A. Clerk-inspector for the Pacific Fruit Express.

Q. How long had you lived in Pocatello—no, I

(Testimony of Norell Checketts.)

will ask this; how long did you live here after this accident?

A. To the following April after the accident.

Q. What are you engaged in now?

A. I am herdsman for Stanley and Farnes?

Q. And what do you mean by that?

A. I have charge of the dairy cattle.

Q. Where did you live before you came to Pocatello? A. Grace.

Q. Do you have relatives at Grace?

A. No sir. [86]

Q. Do you have any relatives at Preston, Mr. Checketts?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, we see no purpose in this.

Mr. Davis: Withdraw it.

Q. Do you know the width of the bus your son rode back and forth to school?

A. Seven and a half feet.

Q. And do you know the height of it?

A. Nine and a half feet.

Q. And the length?

A. Thirty-two feet.

Q. Do you know the capacity of it?

A. No.

Q. Do you know what lettering was on it?

A. On the back it had "stop" "school bus" in large letters.

Q. On the side was anything written?

(Testimony of Norell Checketts.)

A. Yes, "Independent School District Number One."

Q. What kind of letters were those?

A. A little smaller than those on the back?

Q. What color were the letters?

A. Black.

Q. What color was the bus?

A. Orange.

Q. Was it plainly marked "Independent School District Number One."?

A. Yes sir. [87]

Q. Where do your father and mother live?

A. Just out of Preston, Idaho.

Q. What was your—did you have any understanding as to whether or not you were obliged to send your son to school?

Judge Baum: Objected to as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: I think it is well known that it was his duty to send his child to school however he may answer.

A. Yes sir.

Q. When did you first know that anything had happened to Gary?

A. When they called me at the office.

Q. How old was Gary?

A. Lacked three months of being nine.

Q. What was the condition of his health?

A. Good.

(Testimony of Norell Checketts.)

Q. What was Gary's nature as to whether he was affectionate, was he an affectionate boy?

A. Very much.

Q. Did you love your boy?

A. Yes sir.

Q. Did he return that affection?

A. Yes sir. [88]

Q. Do you miss his comfort and companionship?

A. Yes sir.

Judge Baum: Objected to as being suggestive and leading.

The Court: It has been answered and the answer may stand.

Q. What were the boy's characteristics as to whether or not he wanted to assist and help his parents? A. He was very good.

Q. Did you—taking into consideration the boy's general characteristics and affection did you expect that he would assist you and help you as you needed his help from time to time?

A. Yes sir.

Q. Did you expect that he would be of comfort and assistance to you after you became older and after he became of age? A. Yes sir.

Q. Did you expect that you would be able to use that boy's assistance and that he would give you valuable help up until he became of age, twenty-one years? A. Yes sir.

Q. What is the fact with reference to whether he was an energetic boy?

(Testimony of Norell Checketts.)

A. He was very much that way.

Q. What is the fact as to whether he liked to work? [89]

A. Yes sir.

Q. What is the fact as to his school work?

A. He was very good in school.

Q. Do you know what the amount of the charge against you for funeral charges for Gary was?

A. Around four hundred dollars.

Q. Do you know what the total expenses, the total expense with reference to it was?

A. No, I cannot say.

Q. Handing you exhibit one is that a fair likeness or a good representation of Gary?

A. Yes sir.

Q. As I understand you, you don't want to compute and you don't know what the other expenses are except this four hundred dollars?

A. Yes sir, that is right.

The Court: We will recess at this time for fifteen minutes.

3:50 P.M., June 2, 1949

Mr. Davis: I spoke to counsel in chambers. I suppose counsel will stipulate that this boy met his death in this accident?

Judge Baum: That is correct.

The Court: Then may it be understood that no proof of the actual death need be put in. [90]

Mr. Davis: That is right.

Judge Baum: That is right Your Honor.

The Court: It is so understood, ladies and gen-

(Testimony of Norell Checketts.)

lemen of the jury, it has been stipulated by counsel that it is not necessary to place any proof in this case touching the death of the boy, it is agreed that he met his death in this accident.

Q. Now, Mr. Checketts do you know of the amount of the statement for Gary's funeral services? A. \$407.50.

Q. Do you know what the statement was from the doctor who examined Gary at the hospital?

A. No, I haven't my receipts with me.

Q. You haven't any of the other statements with you? A. No.

Q. (By Mr. Davis): Not having the statements and having set out that item as \$950.00 we at this time waive the difference between \$407.50 and \$950.00, which of course, would be to the advantage of the defendant.

The Court: I imagine there is no objection to that.

Judge Baum: We have no objection.

Mr. Davis: That is all of this witness.

Judge Baum: No cross.

MRS. TWILA CHECKETTS

called as a witness by the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. You are or were the mother of Gary Check-

(Testimony of Mrs. Twila Checketts.)

etts? A. That's right.

Q. This is your husband (indicating)?

A. Yes sir.

Q. Doyle, here, (indicating) is your son?

A. Yes sir.

Q. Was Doyle going to school and was he on the bus at the time the accident happened?

A. Yes, he was.

Q. At the time Gary was killed?

A. Yes sir, he was.

Q. You heard Mr. Checketts—withdraw that—
How old was Gary, Mrs. Checketts?

A. He lacked three months of being nine years old.

Q. What was his health?

A. Very good.

Q. What is the fact as to whether he was industrious?

A. He was very much so for a child of his age.

Q. What is the fact as to how he did in school?

A. He was very good in school.

Q. What is the fact as to whether he showed any affection for you? [92]

A. Very much so, yes.

Q. Did he help you?

A. He was awfully good to help in the house for a little boy.

Q. What is the fact as to whether or not he was obedient and would mind well?

A. He always minded very well.

(Testimony of Mrs. Twila Checketts.)

Q. Did you love Gary?

A. Yes sir.

Q. Did Gary return that love and affection.

A. Very much so.

Q. Have you missed his love and affection and do you miss it now? A. Yes sir.

Q. Do you miss his companionship?

A. Yes sir.

Q. What did you believe or expect from his characteristics or attitude as to whether he would be a comfort to you, and a companion as you grew older? A. I know he would have been.

Q. What do you think as to whether he would help you and your husband if you needed help?

A. He would have helped.

Q. As he grew older and you grew older, after he attained the age of twenty-one, what do you think as to whether he would have worked for his father and you? A. Yes he would. [92-A]

Q. What was his characteristics as to whether he liked to stay with his mother?

A. He was very affectionate, he was always very good to me and very affectionate with me.

Q. Where were you at the time of the unfortunate accident? A. At home.

Q. You did not see Gary at that time?

A. No.

Q. It was sometime later?

A. It wasn't until the next day.

Q. Did you have any other children?

(Testimony of Mrs. Twila Checketts.)

A. I had Doyle age seven and a baby three weeks old.

Q. How old was the baby did you say?

A. Three weeks.

Q. Mrs. Checketts, I show you this exhibit 1, and ask you if that is a good likeness and fair representation of Gary at the time you last saw him?

A. Yes sir, it is.

Mr. Davis: That's all, you may examine.

Judge Baum: No questions.

Mr. Davis: We rest at this time.

The Court: We will recess at this time for fifteen minutes.

3:35 P.M., June 2, 1949

ROBERT R. SMITH

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Your name is Robert Smith.

A. Robert R. Smith.

Q. How old are you?

A. Twenty-four.

Q. You live where?

A. 809 South 10th.

Q. In Pocatello? A. Yes sir.

Q. In February, 1947, where were you living?

A. 754 North Arther.

Q. Here in Pocatello? A. Yes sir.

(Testimony of Robert R. Smith.)

Q. Were you a student at that time in any school?

A. The Southern Branch, now Idaho State College.

Q. What type of work were you doing in addition to that of being a student?

A. Bus driver.

Q. By whom were you employed?

A. Independent School District Number One.

Q. Were you driving a bus on the 24th of February, 1947? A. Yes sir. [94]

Q. What type of bus was that?

A. About sixty passenger, school bus.

Q. Do you know its approximate length?

A. About thirty-three feet long.

Q. Did it have a number?

A. Yes sir, bus number two.

Q. Is that the bus that Gary Checketts was riding in? A. Yes sir.

Q. Do you recall what time you left your first station that afternoon?

A. The first station about four o'clock.

Q. Where did you go?

A. The first station would be the high school, then to the Franklin Junior High and then to Whittier.

Q. Where did you pick up Gary Checketts?

A. Whittier.

Q. Where is that?

A. South Fourth about the 900 block.

(Testimony of Robert R. Smith.)

Q. Where did you drive them?

A. Down second toward Ross Park until I came to the cut-off to the highway, and I turned and drove to the highway.

Q. Where is that? A. At Weller's.

Q. That is called Wellerville?

A. Yes sir. [95]

Q. And when you reached the highway which way did you go?

A. Turned right on the highway and went south.

Q. South at that point? A. Yes sir.

Q. Do you recall when you approached Meridell Park or the Owl Club?

A. Approximately four-thirty.

Q. What is the terrain there, is it a level road?

A. It dips a little, the Owl Club is in a sort of dip about in the center of the dip. There is a slight rise on each side.

Q. What did you do at the Owl Club?

A. I started to stop there, I have students that get off there.

Q. Where did you stop?

A. Right at the Owl Club?

Q. Did you stop in the highway?

A. Yes sir.

Q. In your line of traffic? A. Yes sir.

Q. Did some children get off? A. Yes sir.

D. Did this bus have a signal arm on it?

A. No.

Q. No arm? [96]

A. No arm.

(Testimony of Robert R. Smith.)

Q. What sort of lights were on it?

A. Clearance lights on front and two large amber lights on the rear that have stop written on them.

Q. Are they blinker lights? A. Yes sir.

Q. Were they working that day?

A. No sir.

Q. After this accident did you make a test of the lights? A. Yes sir.

Q. Were they working? A. No.

Q. The blinker lights in front were not working? A. No sir.

Q. That was a regular stop was it?

A. Yes sir.

Q. You stopped in your line of traffic?

A. Yes sir.

Q. Do you know how wide the highway—the surface of the highway is at that point?

A. Not exactly?

Q. What is your best judgment?

A. About fourteen feet.

Q. To the west of that point was there a borrow pit, and graveled surface?

A. Short graveled surface and a deep borrow pit. [97]

Q. To the east.

A. The road leading into Meridell Park and there is a clearing in front of the Owl Club.

Q. A wide sort of flange there in the highway?

A. Yes sir.

(Testimony of Robert R. Smith.)

Q. Extending how far up and down the highway? A. Fifty feet.

Q. Do you know how wide it is?

A. Twenty to twenty-five feet.

Q. You didn't turn over in that space to unload?

A. No sir.

Q. As you drove up and stopped, relate to the jury what you saw or observed, give them the entire story?

A. I had four children that was supposed to get off, and I stopped the bus and opened the door.

Q. Where is this door?

A. Toward the front of the bus opposite the driver's seat.

Q. On the right side? That's right.

Q. Go ahead?

A. I opened the door and the children started to get off. I was watching the children, I looked up the highway and saw this truck—I didn't give it much thought, I looked back at the children getting off, sometime there I looked into the rear mirror—the rear view mirror [98] I noticed some cars stopped behind the bus; the children had just about finished getting off and I noticed this truck wasn't going to stop; this high-school student that rode the bus, I told him——

Mr. Davis: We object to this unless——

Judge Baum: ——Did you give the children or the child warning?

A. No, not the child.

(Testimony of Robert R. Smith.)

Q. Did you give this high-school boy warning?

Mr. Davis: Now, I object to anything that was said to anyone unless the warning was to Gary Checketts.

The Court: That is right, sustained.

Judge Baum: This is preliminary.

The Court: Objection sustained.

Q. When you first noticed this truck where was it, I am thinking about the truck that you said you noticed, which way was it coming from?

A. From the south.

Q. From the south?

A. Yes, it was headed toward town.

Q. How far was it from where you were in the bus when you first saw it?

A. When I first noticed it, it was about a block or a block and a half in front of the bus.

Q. As to its rate of speed, what have you to say? [99]

A. I was looking around, one place an another, and I wasn't paying too much attention to the rate of speed; I know he wasn't going at a terrific rate of speed, about average I would say.

Q. At the time you first noticed him were any of the children off the bus?

A. As I recall I had opened the door and they started to getting out when I first noticed it.

Q. Do you know which one got off first?

A. Gary got off first.

(Testimony of Robert R. Smith.)

Q. The relative ages or sizes of the other children?

A. They must have been—well, the two youngest must have been first or second graders, six or seven and then there was one high school student.

Q. Then Gary and then the high school student?

A. Yes sir.

Q. He was the last one off? A. Yes sir.

Q. As you looked back the next time where was this truck?

A. As the high school student was getting off.

Q. I don't know who was getting, but when you looked back the next time.

A. The truck was still approaching and I noticed that he wasn't going to stop.

Q. How far was he from you? [100]

A. Pretty close.

Q. How fast was he driving?

A. About the same.

Q. About the same as he had been?

A. Yes sir.

Q. Then what happened?

A. As I saw that he wasn't going to stop I told the high school boy—

Q. —No, not that.

A. Well the little boy got off and ran toward the back of the bus and I looked up and the truck was still coming and I looked into the rear view mirror and I saw the little boy's head on the side of the

(Testimony of Robert R. Smith.)

road and the truck pulled on up and stopped.

Q. Did you get out of the bus?

A. Yes sir.

Q. Where did you go?

A. I ran around the bus and across the highway toward the truck.

Q. What did you observe?

A. The truck driver had jumped out of the truck; he yelled to tell me——

Mr. Davis: We object to that.

The Court: Just what happened there.

A. The truck driver jumped out and he told me to turn a car around and go to the hospital, just then the State [101] police officer came toward us and he had turned around—he saw what happened I presume. He laid the boy in the seat of the police car and took off.

Q. How far was this truck—strike that. You referred to Mr. Bowman when you mentioned the driver of the truck?

A. Yes sir.

Q. How far was this truck from your bus as you ran up?

A. Must have been about sixty feet from the back of the bus to the back of the truck.

Q. Where was Gary Checketts laying when you got up there?

A. In front of the truck.

Q. How far from the front of the truck?

A. He was right in front as I remember.

(Testimony of Robert R. Smith.)

Q. Where was the truck in reference to its line of traffic?

A. Still in that line of traffic, might have had one wheel in the gravel.

Q. State where Gary Checketts was in reference to the front of that truck?

A. In the right hand line of traffic in front of the truck.

Q. Where was Mr. Bowman?

A. He was picking up the boy as I remember or had picked him up.

Q. The patrolman came and Mr. Bowman and the boy, Gary Checketts and the patrolman left?

A. Yes sir. [102]

Q. How long did you stay?

A. Just a few minutes.

Q. Then you drove on? A. Yes sir.

Judge Baum: That is all, you may inquire.

Cross-Examination

By Mr. Davis:

Q. Mr. Smith, this test that was made of the lights; that was made after you had completed your run and come back in front of the Owl Club?

A. Yes sir.

Q. When you are inside of the bus can you tell whether the lights are blinking or not?

A. No sir.

Q. And you didn't mean to say that you knew that the lights were not blinking at the time you let Gary Checketts off? A. No sir.

(Testimony of Robert R. Smith.)

Q. Was there any kind of signal on the front of the bus that you give when turning?

A. Yes sir, directional signals on the fenders, front and back that indicate the direction you are turning.

Q. Is there one on there? A. Yes sir.

Q. And was on there that day? [103]

A. Yes sir.

Q. You could work it that day?

A. Yes sir.

Q. You think the road was about fourteen feet wide at that point?

A. Yes sir, approximately.

Q. You say this man was coming at a terrific speed? A. No sir.

Q. I meant to say that you said he wasn't coming at a terrific rate of speed?

A. No sir, he wasn't.

Q. What do you mean by a terrific speed.

A. Some drivers go by pretty fast.

Q. Do you mean seventy or eighty miles an hour? A. Sixty or seventy.

Q. What do you call normal speed, forty or fifty.

A. About forty.

Q. You didn't notice any difference in this man's rate of speed from the time you first saw him until he passed your bus? A. No.

Q. Did you hear him honk his horn?

A. No.

(Testimony of Robert R. Smith.)

Q. Did you hear his brakes screech or howl?

A. Not that I remember.

Q. He was a block or a block and a half away when you first [104] saw him? A. Yes.

Q. Do you mean three hundred feet, by a block?

A. Is that about a normal city block?

Q. That is what I think?

A. And that is what I had in mind.

Q. He was three to three hundred fifty, no, three hundred to four hundred fifty feet away when you saw him first? A. Yes sir.

Q. And your children were getting off the bus then? A. Yes sir.

Q. He didn't slow down?

A. Not that I know of.

Mr. Davis: That is all.

Redirect Examination

By Judge Baum:

Q. You had trouble with those blinker lights for some time? A. Yes sir.

Q. This arm was something in the rear of the bus you used when you were turning?

A. Yes sir, the rear and the front, but it wasn't an arm.

Q. It was no arm?

A. No sir, on the light.

Q. It was just on the light? A. Yes sir.

Q. Was there any arm on the front or the back of that bus? [105] A. No sir.

Q. Did you blow your horn at that time?

A. No sir.

(Testimony of Robert R. Smith.)

Judge Baum: That is all.

Recross-Examination

By Mr. Davis:

Q. I am going to ask you with reference to the question that was asked you and the answer that you made at the time you gave testimony before, would you like to have this handed to you before I ask it so that you can see it?

A. It doesn't matter.

Q. I asked you about this, and this is what I had reference to; is that on some buses they have a long arm and the driver gives his warning, I think that was the question, and I asked, do you have that on this particular bus and you answered no, we have a signal directional arm used to signal directions, turning right or left, we have a signal direction, or rather, it covers every direction and stop, did you make such an answer.

A. Well, the little directional signal don't have anything to do with the stopping. They are about three inches in diameter, the lights and they have a little arrow inside and it works on a lever inside, you flip it up or down to indicate which way you are going to turn, it has nothing to do with stopping. [106]

Q. If it covers every direction or stop—did you mean the direction signal or the stop signal?

A. The directional light covers every direction, when we turn left or right.

Q. How is that painted.

(Testimony of Robert R. Smith.)

A. Black normally and about three inches in length.

Q. Does it throw out from the bus?

A. No it is stationary.

Q. And where does it set on the bus?

A. On either fender in front, in the middle of the fender.

Q. When you stop do you, or does the bus show it as stopped with this signal?

A. Those have nothing to do with this signal arm, all they indicate is which way the bus is turning. The light goes on left when I turn left and it goes on right when I turn right.

Q. What did you mean when you answered that it covers every direction or stop?

A. I don't know. It hasn't anything to do with stopping.

Q. When you stop the school bus you put on the brake? A. Yes sir.

Q. Does that turn on any light except the blinker? A. Just the blinker.

Q. Are there lights on the back of the bus besides the blinker lights?

A. Yes sir, the tail light and the clearance light and the [107] directional signal light.

Q. What about the tail light, when you put on the brake does it turn that on?

A. No sir, just when the lights are on.

Q. And it was broad daylight at that time.

A. Yes sir.

(Testimony of Robert R. Smith.)

Mr. Davis: That is all.

Judge Baum: That is all.

FRED W. GOODSON

called by the defendant as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Baum:

Q. Your name is Fred W. Goodson?

A. Yes sir.

Q. You are employed by whom?

A. Bullock Motor Company.

Q. Were you living in Pocatello on February 24, 1947? A. Yes sir.

Q. Who were you working for at that time?

A. Independent School District Number One, Pocatello.

Q. In what capacity?

A. School bus foreman.

Q. Were you acquainted with school bus number two? A. Yes sir. [108]

Q. You are acquainted with Mr. Smith, who just left the witness stand?

A. Yes sir.

Q. Was he one of the bus drivers at that time?

A. Yes sir.

Q. Did you on the evening of the 24th of February inspect that bus? A. Yes sir.

Q. Where was that inspection made?

A. The first was at—across from the scene of

(Testimony of Fred W. Goodson.)

the accident.

Q. Where was—strike that—what time was that?

A. About five or five-thirty that evening.

Q. Will you state to the Court and jury with reference to the lights on the front of that bus?

A. Well, the bus is set up with the normal headlights, a clearance light on each side, on the roof of the bus in the middle is a cluster of three; on each fender is a circular shaped light which is baked enamel with a light in it to use as a directional signal; on top is two stop lights with motor lights and with the word "stop" printed on the light.

Q. Are they known as blinker lights?

A. Yes sir.

Q. These directional lights are only on when the lights are on Mr. Goodson?

A. The only time they are on is when the driver indicates [109] with a handle the direction he is going.

Q. If he doesn't flip the handle they don't go on?

A. No sir.

Q. Those directional lights work from what?

A. From a handle on the steering wheel.

Q. That must be worked to make them light?

A. That is worked manually.

Q. And it must be worked to make the directional lights go on?

A. Yes sir.

(Testimony of Fred W. Goodson.)

Q. The clearance lights are they independent or are they on all of the time?

A. They are on a switch.

Q. You mean that they are not on in the day-time.

A. No sir, they are not.

Q. The blinker lights work from what source?

A. The driver applies his brakes, causes a circuit and that works an electric motor that causes the flashing or blinking effect of the light; they have to work entirely from the brake.

Q. What time of the day did you inspect that bus?

A. Between five and five-thirty.

Q. In the evening?

A. Yes sir.

Q. The day of the accident?

A. Yes sir.

Q. Were the blinker lights working?[110]

A. At that time they were not.

Q. Had you had trouble with the blinker lights on that bus at any time?

A. Yes, we had.

Q. Was there an arm on the bus that swings out?

A. Not at the time of the accident.

Q. They put one on afterward?

A. Yes, sir.

Judge Baum: You may examine.

Cross-Examination

By Mr. Davis:

Q. It was put on at a time afterward when the State law was changed?

A. Yes, sir.

Q. To comply with another State law that was adopted?

A. That is the way I recall.

(Testimony of Fred W. Goodson.)

Q. There wasn't any law with reference to it at that time? A. Not that I know of.

Q. Mr. Goodson, the fact is, is it not that when the motor that operated these blinker lights was not and the brakes were applied the blinker lights work, that is what you found out?

A. Yes, sir.

Q. And you testified at the Coroner's inquest did you not? A. Yes sir.

Q. Do you recall making this statement: "and if the lights [111] on the back of the bus worked the front ones had to be at the time of the accident, there is no getting around it"?

A. Are you speaking of the blinker lights?

Q. Yes. A. Yes sir, I did.

Q. Now, if people saw the blinker lights working on the back of the bus at the time of this accident; if the blinker light worked on the back of the bus at the time of the accident, they had to work on the front? A. Yes sir.

Q. They were in a series? A. Yes sir.

Q. And couldn't help but both work if one worked? A. That's right.

Mr. Davis: That is all.

Redirect Examination

By Judge Baum:

Q. You checked the lights the next morning?

A. That's right.

Q. And they didn't go on? A. No sir.

Q. That is the front and back blinker light?

(Testimony of Fred W. Goodson.)

A. Yes sir.

Judge Baum: That is all, thank you.

Recross Examination

By Mr. Davis: [112]

Q. The test was the next day? A. Yes sir.

Q. And you didn't mean to change your previous answer that if the blinker lights were working or blinking on the back of the bus they had to be blinking on the front?

A. Yes sir, if one was working they all had to be working.

Mr. Davis: That is all.

Judge Baum: That is all.

RALPH L. BOWMAN

called as a witness by the defendants, after heretofore being sworn testifies as follows:

Direct Examination

By Mr. Peterseon:

Q. You are the truck driver referred to here?

A. Yes sir.

Q. And your name is what?

A. Ralph L. Bowman.

Q. Where do you live?

A. 907 North Ninth.

Q. You are a married man? A. Yes sir.

Q. You have a wife and children?

A. Yes sir.

Q. How many children? A. Two.

Q. What were you doing on the 24th day of

(Testimony of Ralph L. Bowman.)

February 1947? A. I was delivering gasoline.

Q. For whom were you working?

A. Covey Gas and Oil Company.

Q. Had you made a trip out of town that day?

A. Yes sir.

Q. Where to? A. McCammon?

A. What type of truck were you driving?

A. Ton and a half Federal Delivery truck?

Q. That is not known as a tanker?

A. No sir.

Q. Just one truck and not a trailer?

A. No sir, no trailer.

Q. Your children's ages, Mr. Bowman?

A. Two and six.

Q. What time—withdraw that—what were you taking to McCammon, Idaho? A. Gasoline.

Q. Did you unload it? A. Yes sir.

Q. Coming back do you recall coming over a hill in the Meridell Country? A. Yes sir.

Q. How fast were you driving—withdraw that—coming into the area known as the Meridell area, are you [114] coming up or going down hill?

A. Coming up.

Q. That is coming out of the curve next to the railroad? A. Yes sir.

Q. Is that perceptible, that rise?

A. Yes sir, quite steep.

Q. The terrain around Meridell park and the Owl Club is what?

(Testimony of Ralph L. Bowman.)

A. The Owl Club lies in a low space with rises on either side.

Q. The rise to the south, how far is it until you reach the crest of the hill.

A. Three-quarters of a mile.

Q. Do you recall what gear you were in coming over the hill there?

A. I had to shift to low to pull the hill.

Q. After getting to the crest and over how were you running?

A. I was shifting into high, coming down the hill.

Q. How fast were you driving?

A. Between thirty-five and forty miles an hour.

Q. Did something occur at the Owl Club?

A. Yes sir.

Q. State to the jury what happened, what you observed as you came down the highway as to the bus and other cars?

A. The first I saw the bus there was another car trying to pass it.

Q. How far down the road was that from you?

A. Half a mile.

Q. Was the bus moving at that time?

A. It appeared to be moving.

Q. Tell what else you saw?

A. Well sir, this car, it looked like it passed one car and was attempting to pass the bus, I was watching him; there wasn't too much distance between the bus and my truck.

(Testimony of Ralph L. Bowman.)

Q. How far was this car—withdraw that—how far away were you at that time from the bus?

A. About one city block.

Q. What did you observe after that?

A. By that time this fellow's car couldn't get around the bus to let me by and he ducked back, at that time I was on the bus or close to the bus and saw some children jumping off the right hand side, at that time I realized the bus was stopped?

Q. How far were you away at that time?

A. About five or ten feet.

Q. Who did you see getting off, was it one or more?

A. I could see a group of legs under the door of the bus, the door appeared to swing out and I could see their legs under this door.

Q. What happened then, go ahead?

A. The next thing I knew I had hit this boy.

Q. What did you do?

A. Well, I don't really know, at first I kind of coasted to a stop.

Q. Where were you when you first saw the boy you hit, where was your truck?

A. Right to the side of the bus?

Q. Alongside the bus? A. Yes sir.

Q. Do you know what part of the truck, you were driving, hit the boy?

A. The right front headlight.

Q. What did you do with reference to coasting, what do you mean by that?

(Testimony of Ralph L. Bowman.)

A. I don't recall stepping on the brake or don't recall what happened just then, I could see the boy laying on the front of the truck?

Q. You coasted to a stop? A. Yes sir.

Q. How far did you travel, if you know?

A. A hundred feet at least.

Q. Did you—where did you stop the truck as to being in your lane or traffic?

A. I don't think I pulled off the highway, I just wanted to get stopped as quick as I could,

Q. Did you get out of the truck?

A. Yes sir. [117]

Q. What did you observe?

A. When I stopped I saw the boy slide off the front of the truck.

Q. Was the boy still on the truck until you stopped? A. Yes sir.

Q. Did you get out and run around to the front of the truck? A. Yes sir.

Q. What did you see?

A. The boy was laying in front of the truck.

Q. How far from the truck?

A. Right in front of it?

Q. How many feet away?

A. Immediately in front.

Q. The truck had a bumper did it?

A. A big heavy bumper, a wide bumper and he was lying on the bumper I guess.

Q. What part of the truck was he by? Was it the left or the right side?

(Testimony of Ralph L. Bowman.)

A. Right in front of the right front tire.

Q. You picked up the child?

A. I picked the boy up, at that time I saw this bus driver running up to me and I told him to get one of these cars turned around to take him to town and he said "here comes the patrolman" at that time he stopped in the middle of the road half turned around and I got in the back with him and went to the hospital. [118]

Q. Was the patrolman out of his car at that time? A. No.

Q. Did you have a quilt there? A. No sir.

Q. Did you have a tarp out there?

A. No sir.

Q. You had the child in your arms?

A. Yes sir.

Q. Where did you put him?

A. On my lap, in the car.

Q. Where did you sit?

A. In the back seat.

Q. Where did you go?

A. St. Anthony's hospital.

Q. With the road patrolman? A. Yes sir.

Q. Where did you go then?

A. Back to the scene of the accident?

Q. After you left the hospital?

A. Yes sir.

Q. Where did this little boy ride to the hospital?

A. In the back seat of the car on my lap.

(Testimony of Ralph L. Bowman.)

Q. And you returned to the scene of the accident with Mr. Howe? A. Yes sir. [119]

Q. And later on you left the scene of the accident? A. That's right.

Q. Were you there when the bus came back?

A. The bus was there when we got out.

Q. Were you there when the tests were made on the blinker lights? A. Yes sir.

Q. Were the front blinker lights working?

A. No sir.

Q. Were the rear blinker lights working?

A. No sir.

Q. Did you see any blinker lights working as you approached the bus?

A. No, I saw nothing to indicate the bus was stopped, it appeared to be moving to me.

Q. Was there an arm out? A. No sir.

Q. Was the bus parked in the lane of traffic?

A. Yes sir.

Q. Was there a shoulder to the west?

A. Yes sir.

Q. How wide was that shoulder?

A. About five feet wide.

Mr. Peterson: That is all Mr. Bowman, you may examine Mr. Davis. [120]

Cross-Examination

By Mr. Davis:

Q. Mr. Bowman, you spoke just now about coming around a curve at the railroad track, just before you got over the raise going to Meridell Park,

(Testimony of Ralph L. Bowman.)

do you mean to say that just after you pulled up the hill after you left the railroad you came to Meridell Park? A. No sir.

Q. How many miles is it from Meridell to that Portneuf Hill?

A. I don't know, you come over that hill and there is another little raise.

Q. Your truck was empty? A. Yes sir.

Q. What hill did you shift on?

A. I never got in high gear after I got up the Portneuf hill until I got on the other raise.

Q. That is the steepest hill? A. Yes sir.

Q. After you got on the Portneuf hill you didn't have to stay in low?

A. No sir, I shifted into second and shifted down to low on the second.

Q. There is another hill after the Portneuf before you get to Meridell that you have to shift to low?

A. I didn't get speed up after I got up Portneuf Hill before I got to the second raise. [121]

Q. You had to shift into low twice?

A. That's right.

Q. How far from the top of the Portneuf Hill is it to Meridell Park?

A. I don't really know, it is close to a mile or a little more.

Q. You came up past that, you passed what used to be the old Golf course? A. Yes sir.

Q. How far is it from that to Meridell park?

(Testimony of Ralph L. Bowman.)

A. I don't know in mileage.

Q. You had travelled that road repeatedly in hauling gas with your truck?

A. Not very often.

Q. How many times within a year prior to this had you gone over that road?

A. Four or five times.

Q. You had travelled it repeatedly with your own touring car?

A. At that time I hadn't too many times.

Q. You knew that the school bus operated on that road?

A. I never saw the bus there; I never gave it any thought about the school bus being there.

Q. You knew it was about time for school to be out?

A. I didn't compare the time with school time, I never [122] gave it any thought as far as school was concerned.

Q. You are familiar with the condition at the Owl Club and Meridell Park as to residences?

A. Not very well.

Q. You went back out after the accident?

A. Yes sir.

Q. You looked it over out there?

A. Yes sir.

Q. You knew that children couldn't go anywhere but east after they got out of the bus?

A. I never knew there was any residences up there.

(Testimony of Ralph L. Bowman.)

Q. You knew there wasn't any residences on the West? A. I could see that.

Q. Have you testified that you knew if they got out that they would have to go east?

A. There is nothing on the other side to go to.

Q. The only place would be across the street or the road? A. Yes sir.

Q. You remember testifying at the Coroner's inquest? A. Yes sir.

Q. I will ask you, first I will show you this and then ask you if you were asked and if you so testified: You were asked how far you were from the school bus when you noticed the first youngster get off? A. Yes sir. [123]

A. Yes sir, I did answer that.

Q. You knew the danger of passing the school bus when they were stopped?

A. Yes sir, I do.

Q. You never passed a bus before when it was stopped?

A. No, I never met a bus there before.

Q. You had met busses at other places?

A. Yes sir.

Q. You never passed one that was stopped?

A. No sir.

Q. You always did stop for them?

A. Yes sir.

Q. Now, Mr. Bowman you were not calm and collected at that time, at the time of the accident?

A. No.

(Testimony of Ralph L. Bowman.)

Q. You don't remember all of the details?

A. Of course not.

Q. You knew that it was a serious matter to pass a school bus that was stopped unloading children?

A. Yes sir.

Q. You were greatly concerned after this happened?

A. Yes sir.

Q. Did you mean to indicate Mr. Bowman when you described this truck that it is a truck that you can load things on and off or that it is a regular oil tank fastened on the truck; built for the purpose of containing oil [125] and hauling oil?

A. It is a compartment gasoline tank.

Q. It cannot be used as a pick-up?

A. Yes sir.

Q. You take the tank off?

A. It has a compartment in the back.

Q. How large a compartment?

A. About five feet, the width of the truck.

Q. And the truck holds a thousand gallons of gas.

A. Yes sir.

Q. That purpose of it was to haul gas and petroleum products and deliver them to the customers?

A. Yes sir.

Q. It wasn't used for any other purpose?

A. No sir.

Q. It contained a tank on the truck that held a thousand gallons of gas?

A. Yes sir.

Q. Now, you, as I understand it, are not able to say and don't care to estimate at this time how

(Testimony of Ralph L. Bowman.)

far it is from Meridell park where the unfortunate accident occurred to the top of Portneuf Hill?

A. I really don't know.

Q. You don't know how far it is from there to where you shifted gears the other time?

A. No sir. [126]

Q. As you approached you saw a number of cars in this line? A. I saw the bus and one car.

Q. You just saw one car. A. Yes sir.

Q. That car was trying to pull out you thought?

A. It was out in my lane.

Q. You were apprehensive about that?

A. It was drawing my attention and not seeing the bus pull off I presumed it was moving.

Q. You knew it might stop, you knew that it carried children?

A. I had no idea that the bus would be stopping in the middle of the highway, it never entered my mind, there was never an indication that the bus should be stopping.

Q. Do you mean it was over in your side, directly in the middle of the highway?

A. In the middle of his lane of traffic.

Q. Where were you?

A. In my line of traffic.

Q. You stayed in your line of traffic?

A. Yes sir.

Q. The fact of the matter is, when you saw this child you thought you could go on by?

A. No sir, at the time I saw these children were

(Testimony of Ralph L. Bowman.)

getting off, I was right on the bus. [127]

Q. You didn't think anything about it when you saw the children getting off?

A. When I saw the children getting off I couldn't have stopped. If I had been expecting it at that close range I don't know what I would have done.

Q. Even when you saw the children getting off you could have stopped much shorter than 133 feet, in a much shorter distance?

A. Yes, if I hadn't hit the little boy I could have stopped immediately.

Q. You didn't try to stop?

A. I don't know what I did. I immediately stopped when I realized what happened; I could stop immediately.

Q. You unfortunately didn't pay any real attention to the school bus until it was too late.

Mr. Peterson: We object to that as being argumentative.

The Court: He may answer.

A. My attention was on the car and not the bus.

Q. You didn't know the bus had stopped?

A. There was nothing to give me any indication that the bus was stopped.

Q. You didn't know the bus had stopped?

A. No, I didn't know the bus had stopped.

Q. When you saw the children you knew it was stopped? A. Yes sir. [128]

Q. Now, to the east of you and to the east of

(Testimony of Ralph L. Bowman.)

where you hit the boy the road is very much wider than it is in that section, that is, to the east of where you hit the boy the road is very much wider than its natural roadbed, and a person coming north, in the direction you were driving could have turned off to the east and could stay on the road for as much as twenty feet and be on a good roadway?

A. If I had time to realize that I would have time to stop.

Q. I was trying to get that clear Mr. Bowman, at the time you approached the bus and at the time you unfortunately struck the boy; to the right hand side or to the east there was a distance there of at least twenty feet that you could have turned off and been on good solid ground?

A. Yes sir, if I had been going to stop and pull off, it was plenty wide.

Q. Mr. Bowman, the seat on the truck you were driving what is the height of that from the ground as compared to the seat of an ordinary touring car?

A. It is a little higher?

Q. How much higher would you say?

A. About one foot I imagine.

Q. As you came from the south that would give you that much more height and you could see where the school bus was sooner than if you were sitting in an ordinary car? [129]

A. I think so, yes sir.

Q. Did you honk your horn as you approached this bus?

(Testimony of Ralph L. Bowman.)

A. I hit the horn about the time I was right on the bus.

Q. Why did you honk your horn?

A. Instinct I guess, I really don't know why; it is the natural thing to do.

Q. Did you put your foot on the brake the same time you honked the horn? A. I don't know.

Q. You don't know whether you coasted to a stop or whether you put on the brake after you saw what had unfortunately happened?

A. Yes sir, I realized I was coasting along at that time and I applied the brake before that, until that time I don't know exactly what I did.

Q. When did you apply the brake with reference to the time you honked your horn?

A. I really don't know.

Q. The only reason for honking the horn was to warn these children and make them get out of the way? A. I guess so, yes.

Q. You only saw two cars?

A. All I saw was this bus and the other car trying to pass the bus.

Q. Did you afterward see other cars? [130]

A. After I stopped I saw several.

Q. If you had seen the other cars that would have made you apprehensive; if you saw those other cars you would have thought that you should have stopped?

Mr. Peterson: Objected to as argumentative.

The Court: The witness said he didn't see them.

(Testimony of Ralph L. Bowman.)

Mr. Davis: That is all.

Redirect Examination

By Mr. Peterson:

Q. You didn't intend to hurt anyone that day?

A. No, that is the worse thing that ever happened in my life.

Q. You are sorry it happened?

A. Yes sir, very.

Mr. Peterson: That is all.

Recross Examination

By Mr. Davis:

Q. Mr. Bowman, did I say anything at all to you that made you think that I was trying to indicate that you wanted to hit this boy?

A. No sir.

Q. And you don't think that I was trying to show that you did it deliberately? A. No sir.

Q. You wasn't paying any attention to the school—

Judge Baum: Now we object to this, counsel.

The Court: I think that was testified to fully, if he understands it he may answer.

A. I was paying attention, yes sir.

Q. You were driving carefully and all right, in your opinion? A. Yes sir, I believe so.

Q. You are not at fault in any way?

Judge Baum: Objected to as calling for a conclusion.

The Court: Sustained.

Mr. Davis: That is all.

(Testimony of Ralph L. Bowman.)

Mr. Peterson: That is all. The defense rests.

Mr. Davis: We have no rebuttal.

(Admonition to the Jury.)

The Court: We will recess at this time until 10 o'clock tomorrow morning.

10 A. M. June 3, 1949

(Argument of Counsel to the jury.) [132]

INSTRUCTIONS

Ladies and Gentlemen of the Jury: The evidence in this case has all been submitted to you; you have heard the arguments of counsel and if you will give me your attention for a few minutes I will advise you as to the law applicable to this particular matter which you have under consideration. It is your duty as jurors to accept the instructions of the Court as the law in this case.

The issues are made up by the complaint of the plaintiff and the answer of the defendant. The complaint alleges the residence of the respective parties, alleges the fact that the plaintiffs are husband and wife, also alleges the corporate capacity of the defendant Covey Gas and Oil Company. The plaintiffs allege in their complaint that because of the negligence of the defendant in the operation of their truck in passing a school bus of Independent School District Number 1, while the deceased Gary Checketts was alighting from or leaving the bus, and that the driver of the truck of the defendant drove the tank against the body of the said Gary

Checketts, and allege that as a result of said negligence the said Gary Checketts was killed; that by reason of this the plaintiffs have been damaged in the loss of their son in the amount of \$75,000.00 and by reason of the cost of burial of their son they have been damaged in the amount of \$407.50 and they ask for judgment against the defendant in the amount of \$75,407.50.

The defendant filed its answer admitting the residence of the plaintiffs, and admitting the corporate capacity of the defendant, admitting the ownership of the truck in question here, admitting that the driver of the truck was in its employ; in its answer the defendant makes certain affirmative allegations and alleges contributory negligence, which will be defined to you in these instructions, defendant alleges in its answer that the accident, injury and death of Gary Checketts was caused by the negligence of the driver of the school bus; also alleges in its answer that the driver of their truck was acting in a careful and prudent manner at the time of the accident and injury resulting in the death of said Gary Checketts, and ask that the plaintiffs take nothing by reason of their complaint.

Those briefly are the issues which you must pass upon, and are the claims of the respective parties; however, you are to decide the issues from the evidence introduced and not from what may appear from the various claims of the parties.

You are instructed that Covey Gas and Oil Company, a corporation, defendant, was on the 24th

day of February, 1947, the date of the death of Gary Checketts, the owner of a 1½ ton gas truck, bearing Idaho License No. 1B-806, and that at said time and at all times mentioned in the plaintiffs' complaint, Ralph L. Bowman was an employee of said Covey Gas and Oil Company, acting upon the business of his employer and within the scope of his employment.

The issues here are plain. It is a question as to whether or not the defendant was negligent and as to whether that negligence was the proximate cause of the death of the deceased Gary Checketts. This case should be considered by you as between the plaintiffs and the Covey Gas and Oil Company.

The laws of the State of Idaho provide that the parents may maintain an action for the death of a minor child and you are instructed that the plaintiffs in this case as the parents of Gary Checketts, deceased, are entitled to maintain this action against the defendant Covey Gas and Oil Company.

In passing upon the issues in this case, Ladies and Gentlemen, you will bear in mind that the burden is upon the one who asserts the existence of a fact, to establish it, and in a suit of this character to establish the fact by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence, that is the meaning of the word "preponderance"—evidence which convinces you that the truth lies upon this side or that

side, evidence which is more convincing and more persuasive.

In this case the burden is upon the plaintiff in the first place to show by a preponderance of the evidence that the defendant was guilty of negligence in the respect charged in the complaint, and that the death of Gary Checketts and the damage to the plaintiffs was by reason of and because of the defendant's negligence.

There is an allegation of contributory negligence set forth in the pleadings and regarding contributory negligence I will say that it is called contributory negligence because it is charged to be the negligence of the person upon whose behalf the original claim is being made, or in this case the negligence of the deceased Gary Checketts.

The same definition, however, applies to negligence whether it be primary or contributory.

In consideration of the matter of contributory negligence the jury should take into consideration the conditions as they existed at the time of the accident, the age of the person charged with the contributory negligence and his ability to reason and distinguish between acts that would be negligent and those which would not be negligent. In other words, you will determine whether or not Gary Checketts was capable of being contributorily negligent, and whether such contributory negligence, if any existed, was the proximate cause of the accident.

There is, until the contrary is proved, a presumption that the deceased, Gary Checketts, was exer-

cising due and proper care for the protection of his person and the preservation of his life at the time of the accident; this presumption arises from the instinct of self-preservation and the disposition of a person to avoid personal harm. This presumption is not conclusive, but is a matter to be considered by the jury in connection with all the other facts and circumstances of the case in determining whether or not the deceased Gary Checketts was guilty of contributory negligence at the time of the accident.

You are instructed in this connection that in determining whether a child of the age of Gary Checketts is guilty of contributory negligence, that the child's actions cannot be considered in the same light as the action of an adult under similar or identical circumstances or conditions, and that Gary Checketts could only be expected to act or conduct himself as the ordinary child of his age, experience and mental capacity, under the same or similar conditions.

Speaking generally, negligence may be defined as the performance of some act, the doing of some thing, which under the circumstances a reasonably prudent and careful person would not do. You will see that it is a question of what ordinarily reasonably prudent and careful persons, properly regardful of the rights of others, would do under the particular circumstances; or the converse, it is the leaving undone of something, some act, which such prudent and reasonably careful person would have

done under the circumstances. It may be negligence of commission or negligence of omission.

You will notice that I call your attention to the fact that it is what an ordinarily careful and prudent person would do under the particular circumstances; not what such person would do under ideal circumstances, but under the circumstances existing at the time involved here as shown by the evidence.

Proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, but in order to warrant a finding that the negligence is the proximate cause of an injury it must appear from the evidence that the injury was the natural and probable consequence of the negligence and ought to have been foreseen as likely to occur by a person of ordinary prudence in the light of the attending circumstances.

There must be, as you see, a direct causal connection between the negligence of the defendant and the injury to Gary Checketts which resulted in his death. In this case the negligent acts of the defendant must be the proximate cause of the injury, that is the real cause of injury, in order that the plaintiffs may recover.

You are instructed that on February 24, 1947, it was the duty of every parent, guardian or other person having charge of any child between the ages of eight and eighteen years, to send such child to a public, private or parochial school for the entire

year during which the public schools were in session in the District in which the parents and plaintiffs herein lived.

You are instructed that on the 24th day of February, 1947, Section 48-1101 Idaho Code Annotated provided:

“It shall be unlawful for anyone to drive any motor vehicle past a truck, bus or other vehicle being used by a school district to transport children to or from school, at a time when anyone is getting on or off said truck, bus or other vehicle.”

The word “past” as used in the section of the Idaho statute which I have just quoted is subject to the definition given to the word under the circumstances here. It means to go beyond, further on, or on the other side of. Under the law as quoted to you it is unlawful for anyone to drive a motor vehicle past a school bus at a time when anyone is getting on or off said school bus, regardless of from which direction the vehicle may be approaching the school bus.

You are instructed that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company, as in the evidence, and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged. Violation of this law is negligence per se. There was a duty on his part to obey the law.

You are instructed that Gary Checketts, the deceased child, had a right to expect that Ralph L. Bowman, the driver of the truck that struck the de-

ceased child, would stop his truck or motor vehicle and not drive it past a school bus stopped for the purpose of unloading or loading school children, and had a right to believe and expect that the driver of said truck would comply with the law as hereinbefore given you in these instructions.

You are instructed that it is a matter of common knowledge that children may at unexpected moments run upon or across the part of the thoroughfares used for vehicles. The use of such thoroughfares by such children, motorists must be assumed to have knowledge of, and where their presence can be observed a degree of care commensurate with the ordinary emergencies presented in these instances must be exercised. One driving a vehicle must not assume that children of immature years will exercise the care required for their protection and will not expose themselves to danger.

You are instructed as a matter of law that Gary Checketts, having no control or authority whatever as to the operation of the school bus and not having participated in any way in the driving or the operation of the same, that any negligence on the part of the driver or operator of the school bus, if you find there was any negligence on his part, could not be imputed to the said Gary Checketts and he would not be guilty of contributory negligence by reason of any act of the operator of the school bus.

Another law of the State of Idaho provides that it shall be unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly

in wilful or wanton disregard of the rights and safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property.

In passing upon the questions of fact in this case you will determine the credibility to be given the testimony of any witness and you have a right to take into consideration his or her interest, if any, in the result of the case, his or her demeanor on the witness stand, his or her candor or lack of candor, and all other facts and circumstances which could influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

You are instructed that you should not consider any evidence that may have been offered and refused by the ruling of the Court and you should not consider any evidence ordered stricken from the record. Your verdict must be based on evidence admitted as presented from the witness stand. I think I should tell you also that if you have gathered during the course of the trial, because of rulings or because of any remarks made, that the Court has any opinion as to the facts in this case, you will disregard that entirely. If the Court had any opinion, you would not be concerned with that at all, because this is your responsibility and the Court cannot help you or assume any responsibility in passing upon the facts.

If, after deliberating on this matter, you determine that the plaintiffs are entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, by adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict.

I will say that you should not take any particular statement or any particular portion of the instructions and consider that as being the entire law of the case, and you should not place any undue emphasis on any particular portion of the instructions, but you should consider the instructions given you as a whole, and when so considered you should apply them to the facts submitted to you.

You are instructed that the Court is the judge of the law and it is his responsibility to pass on all questions of law, and you are obliged, under your oaths, to take the instructions of the Court as being the law applicable here. However, in the same degree, you are the judges of the fact and it is your duty to pass on all questions of fact. I cannot help you in this; it is entirely and wholly your responsibility.

You are instructed that should you find in favor of the plaintiffs, then, in determining what damages should be allowed as under all the circumstances of

the case may be just, you are to presume that pecuniary loss resulted by reason of the relationship of parent and child existing between the plaintiffs and the deceased. You may consider the health and intelligence of Gary Checketts and his affection and devotion to his parents. You may also consider the loss of his society and companionship suffered by his parents, the comfort and companionship, he would have afforded to them, his aid, advice, support and earnings. You are told in this connection that a son reaches his majority at 21 years of age.

You are instructed that if you find for the plaintiffs in this case, that in fixing the amount of damages that will compensate them you are entitled to take into consideration that each of the plaintiffs has been injured in the loss of their son and that each has been injured in the loss of the affection, companionship and in the loss of whatever support they and each of them may have been justified in expecting to receive from their deceased son, after he reached his majority.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed on a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see one form contains a blank space for the amount of damages you allow if you

find in favor of the plaintiffs, and the other form has no blank space; this, of course, you will use if you find for the defendant. When you arrive at a verdict it will be returned into open Court.

The Court: The alternate jurors will now be excused and the bailiff will be sworn. It will be necessary to take up a matter with counsel. You will be excused for a moment and I will call you back.

OBJECTIONS TO INSTRUCTIONS

The Court: Does the Plaintiff have any objections?

Mr. Davis: No objections to the instructions given by the Court. I do not know the number of my requested instruction perhaps the Reporter will insert the number. Plaintiff's requested instruction Number 1, I want to except to the Court's failure to give the instruction stating that the verdict should be arrived at in accordance with the state law, that three-fourths of the jury in a civil case such as this, can return a verdict, by reason of the diversity of citizenship here and by reason of what we believe is the law in this connection.

The Court: Do you have any objections on the part of the defendant.

Judge Baum: Yes, we desire to object to the failure of the Court to give our instructions on the statute as to stopping in the roadway. I do not know the requested instruction number but will ask the reporter to make it a part of the record.

“You are instructed, Ladies and Gentlemen of the jury that section 49-526 Idaho Code, formerly section 48-524, I C A reads as follows: “Stopping on highway—a. No person shall park or leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway.

“b. Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

“c. The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position.”

Defendant also excepts and objects to the giving of the instruction in reference to the negligence of the driver of the school bus, taking the question of the negligence of the driver of the school bus away from the jury.

The Court: I gave that instruction.

Judge Baum: Yes, but it was so limited and in our opinion did not state the law.

We except and object to the Court's giving the instruction to the jury that the failure of the driver of the truck Mr. Bowman to stop for the school bus was negligence per se, at the most it could only be prima facie negligence.

The Court: The record may show this is in the absence of the jury. I am always anxious to have any criticism of the instructions that counsel may have. If counsel think the Court has erred in any instruction I am always glad to have counsel point that out and I would be glad to always call the jury back and correct or attempt to correct it. That is the purpose of my discussion with counsel in Chambers.

Judge Baum: We think it was error not to instruct the jury in accordance with our requested instruction that the jury should not take into consideration any mental suffering and mental anguish of the parents. I will ask the Reporter to copy our requested instruction in the record at this point.

“Defendant's requested Instruction no.—

“You are instructed Ladies and Gentlemen of the Jury, that if you find the plaintiffs are entitled to

recover you should not take into consideration the mental suffering and mental grief of the parents by reason of the death of Gary Checketts.”

In addition to those we have called to the attention of the Court, we object to the Court's not giving our requested instruction which reads: “You are instructed Ladies and Gentlemen of the jury, that one of the defenses relied upon by the defendants is the “sudden appearance” defense, which defense is effective although defendant might be negligent in the operation of the said truck in question, provided the said driver operating the truck could not have avoided the accident complained of even though he had not been negligent.”

We feel the Court erred and we object to the Court's not giving our instruction which reads: “You are instructed Ladies and Gentlemen of the Jury, that the school bus driver owed to the occupants of the said school bus a duty to choose a safe place to stop the school bus, having in mind the age of the children riding upon the bus and their ability to look out for their safety and if the driver opens a door for a child to alight, knowing the child's path will take him across the road in a place of danger, without any warning as under the circumstances would seem appropriate then the driver and operator of the said school bus is guilty of negligence, and if you further find that such negligence on the part of the school bus driver was the proximate cause of the accident then you should find for

the defendants.”

The Court: I don't think there is any evidence to support that. Now, Judge Baum, I will let you give me your definition of the difference between “per se” and “prima facie”.

Judge Baum: “Per se” means it is there as a matter of law and they cannot overcome it, and the other “prima facie” merely shifts the burden of proof.

The Court: Call the jury in Mr. Bailiff. Ladies and Gentlemen of the jury, it has been called to my attention that possibly one of my instructions should be changed somewhat: I instructed you that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company as in the evidence and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged, that violation of this law is negligence per se. I should have used the term prima facie. Prima facie evidence that he did so is evidence that may be overcome by other evidence. Per se counsel suggests, is that which cannot be overcome. I want to correct that and I will read it as it should be “You are instructed that Ralph L. Bowman, the driver of the truck owned and operated by Covey Gas and Oil Company, as in the evidence and herein referred to, was charged with knowledge of the law which forbade him passing the bus while school children were being received or discharged. Viola-

tion of this law is prima facie negligence. There was a duty on his part to obey the law.

You will take that with all the other instructions I have given you, of course, with the correction I have now made.

You may retire again for a moment and you will be recalled again.

Now that the jury has retired again, is *that* any further objection?

Mr. Davis: If Your Honor Please, I am confused now, it is my understanding of the law that a violation of a section of the statute that was in effect at the time of this accident was an indictable misdemeanor and was negligence per se in and of itself. We except to the instruction to the jury that it is only prima facie evidence of negligence. It is prima facie negligence to violate an ordinance and any of a number of laws, but violation of that statute is negligence in and of itself.

Judge Baum: We requested two sections of the Statute I excepted and objected to your Honor not giving section 49-526, I object and except to your not giving only 48-519: "Signals on starting, stopping or turning. a. The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as

required in this section plainly visible to the driver of such other vehicle of the intention to make such movement.

“b. The signal herein required shall be given either by means of the hand and arm in the manner herein specified, or by an approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and rear the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to start, stop or turn by extending the hand and arm horizontally from and beyond the left side of the vehicle.”

I withdraw my exception to the Court's not giving section 49-526.

The Court: I don't believe that the evidence supports the giving of that instruction. I am somewhat disturbed over the correction I have now made in the instruction called to my attention, however, I think it would be more confusing to the jury to try to straighten it out. I don't think the technical difference in the terms is sufficient to be prejudicial.

You may recall the jury Mr. Bailiff.

Now, Ladies and Gentlemen of the jury, you may retire to consider your verdict.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court for the District of Idaho, and

I further certify that I took the evidence and proceedings had in and about the trial of the above entitled cause in shorthand and thereafter transcribed the same into longhand (typewriting) and

I further certify that the foregoing transcript consisting of pages numbered consecutively to page 152 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof I have hereunto set my hand this 12th day of October 1949.

/s/ G. C. VAUGHAN.

[Endorsed]: Filed October 12, 1949.

In the District Court of the United States, for the
District of Idaho, Eastern Division.

No. 1524

NORELL T. CHECKETTS and TWILA
CHECKETTS, husband and wife,
Plaintiffs,

vs.

COVEY GAS AND OIL COMPANY, a
corporation,
Defendant.

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint and all amendments thereto.
2. Answer.
3. Plaintiffs' motion to strike as filed by the Plaintiffs to certain parts of defendant's answer, dated 11th day of April, 1949, and the order granting the motion.
4. Motion of the defendant dated the 1st day of June, 1949, wherein defendant sought an order bringing in as a party defendant Ralph L. Bowman, and the order of the Court made thereon.
5. The entire Transcript of the evidence taken at the trial.
6. The entire Transcript of all proceedings which

were stenographically reported at the trial, including the instructions of the Court.

7. All instructions requested by the defendant which were not given by the Court.

8. Verdict.

9. Judgment entered thereon.

10. Minutes of the Court.

11. Motion for new trial.

12. Order denying new trial.

13. Notice of Appeal.

14. This designation.

A copy of the entire transcript of the evidence as referred to in number three above, and a copy of the proceedings stenographically reported, as referred to herein, will be served and filed as soon as such transcript, or transcripts, are completed by the reporter.

Dated this 2nd day of September, 1949.

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for the Defendant
and Appellant.

[Endorsed]: Filed September 6, 1949.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 1524

NORELL T. CHECKETTS and TWILA
CHECKETTS, husband and wife,
Plaintiffs-Respondents,

vs.

COVEY GAS & OIL COMPANY OF IDAHO,
a corporation,

Defendant-Appellant.

STATEMENT OF POINTS

Appellant states that the points upon which it intends to rely on appeal in the above entitled action, and it deems the entire record on appeal (all except Motion to Bring in Independent School District No. 1, Class "A" Pocatello, Idaho, as Party-Defendant) as necessary for the consideration of the points to be relied upon, namely:

The Trial Court Erred in the Following Particulars:

(a) In refusing to grant the appellant's Motion for New Trial, such Motion being filed and based upon the proposition that the verdict of the jury was excessive in amount and contrary to law and that the amount of the verdict arrived at by the jury is not an amount authorized or allowed by the measure of damages provided in such cases.

(b) In refusing to grant the defendant's Motion for New Trial, which Motion was made upon the

ground that the verdict of the jury was the result of mistake, passion, prejudice or improper motive and that said verdict was the result of bias and prejudice against the defendant.

(c) In refusing to grant defendant's Motion for New Trial upon the ground in said Motion stated that the court refused to instruct the jury that they did not have a right to take into consideration the mental suffering and mental grief of the plaintiffs by reason of the death of Gary Checketts and, particularly, did the court err in refusing to give the foregoing substance of defendant's requested instruction in view of the fact that an instruction was given by the court to the jury advising them that they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, but in such last mentioned instruction the jury was not advised as to whether those were the only items of damages which they could consider.

(d) In refusing to give defendant's requested instruction, such requested instruction asking the court to instruct the jury that, in arriving at the amount of damages, they did not have a right to take into consideration the plaintiff-parents' mental suffering and mental grief resulting to them by reason of the death of their minor child.

(e) In refusing to grant defendant's Motion requesting that Ralph L. Bowman be brought into the trial of the case and be made a party-defendant therein, which Motion was made in writing by de-

fendant prior to the commencement of the trial, Ralph L. Bowman being the operator and driver of the defendant-company's truck at the time and place of the accident upon which the suit is brought, and in signing the order refusing to bring in such Ralph L. Bowman.

(f) In refusing to give defendant's requested instruction that the operator of the school bus in which the deceased, Gary Checketts, was riding, was, in the operation thereof, in violation of Section 48-519, Idaho Code, such Section providing for the duties of persons starting, stopping or turning on the highway, as the same pertains to the operation of school bus in which Gary Checketts was riding.

(g) In refusing to give the following instruction: "You are instructed, Ladies and Gentlemen of the Jury, that one of the defenses relied upon by the defendant is the 'sudden appearance' defense, which defense is effective although defendant might be negligent in the operation of the said truck in question, provided the said driver operating the truck could not have avoided the accident complained of even though he had not been negligent."

/s/ O. R. BAUM,

/s/ BEN PETERSON,

Attorneys for Defendant-
Appellant.

Receipt is hereby acknowledged this 27th day of

October, 1949, of a copy of the foregoing Statement of Points.

/s/ B. W. DAVIS,
Attorney for Plaintiffs-
Respondents.

/s/ L. S. RACINE, JR.,
Attorney for Plaintiffs-
Respondents.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers, to-wit:

Complaint

Answer

Motion to Strike filed April 13, 1949

Minutes of the Court of May 20, 1949 ruling on Plaintiff's Motion to Strike

Defendant's Motion to bring in Ralph L. Bowman as party defendant

Minutes of the Court of June 1, 1949 ruling on Motion to bring in party defendant, etc.,

Minutes of the Court of June 2, 1949.

Verdict

Minutes of the Court of June 3, 1949

Judgment

Transcript of Evidence

Instructions requested by the defendant which were not given by the Court (included in Transcript of Evidence)

Motion for New Trial

Order Denying Motion for New Trial

Notice of Appeal

Designation of Record on Appeal

Statement of Points

Order Extending Time for Filing Appeal in Circuit Court.

are that portion of the original files as designated by the appellant and as are necessary to the appeal under Rule 75 (RCP).

In witness whereof, I have hereunto set my hand and affixed the seal of this court this 3rd day of November, 1949.

[Seal] /s/ ED. M. BRYAN,
 Clerk.

[Endorsed]: No. 12398. United States Court of Appeals for the Ninth Circuit. Covey Gas and Oil Company, a corporation, Appellant, vs. Norell T. Checketts and Twila Checketts, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed November 9, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

